Supreme Court, U.S.
FILED

No. 01-292 AUG 16 2001

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In The

Supreme Court of the United States

REN LABORATORIES OF FLORIDA, INC.,

Petitioner,

v.

KENNETH WEISS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. In a religious discrimination case, is the non-movant's self-serving testimony alone enough to avoid judgment as a matter of law for the employer?

2. When is an employment discrimination plaintiff required to submit evidence in addition to a prima facie case and pretext, in order to survive a motion for judgment as a matter of law under Fed. R. Civ. P. 50?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below, as required by Rule 14.1(b) of the Rules of the United States Supreme Court:

1. Kenneth Weiss, Plaintiff/Appellant;

2. REN Laboratories of Florida, Inc., a Florida corporation, Defendant/Appellee;

3. Kenneth R. Drake, Attorney for the Plaintiff/Appellant;

4. William O. Solms, Attorney for the Plaintiff/Appellant;

5. Steven D. Brown, Attorney for the Defendant/Appellee; and

6. Shannon P. Garbett, Attorney for the Defendant/Appellee.

CORPORATE DISCLOSURE STATEMENT

REN Laboratories of Florida, Inc. is now known as Gambro Healthcare Laboratory Services, Inc. Gambro Healthcare, Inc. f/k/a Gambro Healthcare Patient Services, Inc. f/k/a REN Corporation - USA is the parent corporation. There is no publicly held company that owns 10% or more of the company's stock.

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OPINIONS AND ORDERS ENTERED BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported. It is attached as an appendix. (App. at 1)[1]. The opinion of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing en banc is unreported. It is attached as an appendix. (App. at 37). The opinion of the United States District Court for the Southern District of Florida is published at 1999 WL 976072 and is attached as an appendix. (App. at 9).

JURISDICTION STATEMENT

The decision of the United States Court of Appeals for the Eleventh Circuit reversing the trial court's order granting judgment as a matter of law and affirming the trial court's conditional order granting a new trial was entered on March 8, 2001. The United States Court of Appeals for the Eleventh Circuit's decision denying Petitioner's timely petition for rehearing and rehearing en banc was entered on May 21, 2001. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit by a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute at issue in this case is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2, which says: "It shall be an unlawful employment practice for an employer - (1) . . . to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . religion . . ."

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[1]Citations to the Appendix will be referred to as "App. at ___".

Rule 50(a) of the Federal Rules of Civil Procedure provides, in pertinent part:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue . . .

Fed.R.Civ.P. 50(a)(1).

Rule 50(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.

Fed.R.Civ.P. 50(b).

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The trial of this matter began on February 8, 1999 in the United States District Court for the Southern District of Florida. Respondent, Kenneth Weiss' (hereinafter "Mr. Weiss") only claim at trial was that Petitioner, REN Laboratories of Florida, Inc. (hereinafter "REN"), terminated his employment on July 23, 1993 "**solely** due to his religious beliefs" in violation of Title VII of the Civil Rights Act of 1964, as amended. (App. at 12) (emphasis added). At all appropriate times at trial, REN moved for judgment as a matter of law under Fed. R. Civ. P. 50 based on Mr. Weiss' complete failure to introduce sufficient evidence to prove that his termination was the result of unlawful religious discrimination. On each occasion, the district court reserved oral argument and ruling on the motion. On February 11, 1999, the jury returned a verdict for Mr. Weiss, finding that he was terminated because of his religion. REN again moved for judgment as a matter of law, and the parties filed written motions and briefs.

On September 24, 1999, the district court granted REN's motion for judgment as a matter of law, finding that Mr. Weiss failed to introduce sufficient evidence to permit a reasonable factfinder to conclude that REN's proffered reasons for terminating him - religious harassment and insubordination - were a pretext for discrimination. (App. at 12-13). The district court also conditionally granted REN's motion for new trial, should the judgment be reversed, finding that the jury verdict was against the great weight of the evidence.

The United States Court of Appeals for the Eleventh Circuit reversed, in part, the district court's decision, holding that they were required to accept Mr. Weiss' self-serving testimony that he believed he was terminated because of his religion, that he satisfactorily performed his job and that he did not harass his subordinates or co-workers. (App. at 3).

However, the Eleventh Circuit affirmed the district court's conditional order granting a new trial, citing to-three pages of undisputed evidence and holding that the jury verdict was contrary to the great weight of the evidence. Specifically, the Eleventh Circuit determined that the evidence suggested Mr. Weiss was terminated for poor job performance, insubordination, and religious harassment of subordinates and co-workers. (App. at 5-7). A request by both parties for a panel rehearing or rehearing en banc was denied.

B. STATEMENT OF FACTS

On July 1, 1992, Mr. Weiss was hired by REN as a medical technologist at its laboratory in Fort Lauderdale, Florida. At the time he was terminated, on July 23, 1993, Mr. Weiss had been promoted to evening shift supervisor. Mr. Weiss claimed he was fired solely because he was a born again Christian. (App. at 4). Specifically, Mr. Weiss argued that despite REN's assertions, he did not harass his subordinates or co-workers with unwelcome religious discussions. Mr. Weiss denied that he offended subordinates or co-workers with his religious discussions or outreach. He also argued that the subordinates and co-workers with whom he prayed at work either consented to or requested that he pray with them. (App. at 3-4).

REN argued that Mr. Weiss was terminated because he was not competent in performing his job as a supervisor, he harassed his subordinates and co-workers based on his religious beliefs, and he was insubordinate in refusing to comply with his supervisors' admonitions not to have unwelcome discussions about religion on the job. (App. at 28). Several witnesses gave undisputed testimony regarding Mr. Weiss' religious harassment, which included Mr. Weiss showing openly lesbian employees passages in the Bible concerning homosexuality, trying to give a Muslim employee an unsolicited Bible, laying hands on employees

to cure them when they were ill, and admonishing a new subordinate employee to go to church more often. (App. at 5-7). Several REN employees testified that they complained to management about Mr. Weiss' harassing behavior, and members of REN management testified that they had warned Mr. Weiss to cease making unwelcome expressions of religious faith to subordinates and co-workers. (App. at 5,7). This testimony was undisputed by Mr. Weiss. (App. at 5). REN management also testified about Mr. Weiss' performance problems, including reporting incorrect test results and leaving his shift early. (App. at 5). Finally, REN presented undisputed testimony that Mr. Weiss was insubordinate to management because he did not heed their warnings about unwelcome religious discussions and because he had a violent outburst toward his immediate supervisor in a meeting regarding a disciplinary suspension and other job performance issues. (App. at 6).

The United States Court of Appeals for the Eleventh Circuit concluded that reasonable jurors could have found, by a preponderance of the evidence, that (1) Mr. Weiss satisfactorily performed his job, (2) he did not harass his co-workers, and (3) religion made a difference in REN's decision to terminate him. (App. at 3). In so doing, the Eleventh Circuit stated that it was "bound to accept [Mr. Weiss'] version of the disputed facts in this case." (App. at 3). Applying this standard of review, the Eleventh Circuit found that Mr. Weiss' evidence, which consisted solely of his own denials that he offended or harassed subordinates and co-workers based on religion, was sufficient to overcome REN's motion for judgment as a matter of law. In its decision, the Eleventh Circuit failed to consider the undisputed evidence presented by REN that Mr. Weiss was harassing his subordinates and co-workers based on religion, he was incompetent as a supervisor, and he was insubordinate.

In reversing the judgment as a matter of law, and in relying only on Mr. Weiss' self-serving testimony that he did not harass subordinate employees and co-workers in the

face of undisputed evidence supporting REN's reasons for discharging him, the United States Court of Appeals for the Eleventh Circuit has broken from the holdings in other circuits as well as recent decisions of this Court.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE ELEVENTH CIRCUIT'S REVIEW OF ONLY THE SELF-SERVING TESTIMONY FAVORING THE NON-MOVANT IN DECIDING A MOTION FOR JUDGMENT AS A MATTER OF LAW IS INCONSISTENT WITH THE APPROACH OF OTHER CIRCUITS AND THIS COURT WHICH CONSIDER THE EVIDENCE AS A WHOLE, INCLUDING THE UNDISPUTED EVIDENCE OF THE MOVANT.

It has been settled by this Court that in order to survive a Fed. R. Civ. P. 50 motion for judgment as a matter of law in an employment discrimination case, the non-movant must put forth evidence of a prima facie case and sufficient evidence to find that the employer's asserted legitimate non-discriminatory reasons for the adverse employment action are false, i.e., proof of pretext. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000). In determining that Mr. Weiss had put forth enough evidence that REN's legitimate non-discriminatory reasons for terminating him were a pretext for discrimination[2], the Eleventh Circuit only considered the self-serving testimony of Mr. Weiss that he did not harass or offend his subordinates or co-workers and that he only discussed religion with those subordinates and co-workers who

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[2]The Court of Appeals did not address Mr. Weiss' prima facie case evidence. However, since the court found evidence of pretext, it is inferred that they also found sufficient evidence of a prima facie case.

consented to it or requested he pray with them.[3] (App. at 3-4). Accordingly, the Eleventh Circuit has taken the position that a plaintiff's self-serving testimony alone in an employment discrimination case is enough evidence of pretext to withstand a motion for judgment as a matter of law.

However, there are several circuits that align squarely against the Eleventh Circuit on this issue. In these circuits, the employment discrimination plaintiff's self-serving testimony alone is not enough, in the face of undisputed contradictory evidence, to defeat a motion for judgment as a matter of law made by a defendant employer. *See Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 281 (4th Cir. 2000), *cert. denied*, 531 U.S. 875 (2000), *and reh'g denied*, 121 S.Ct. 613 (2000) (plaintiff's conclusory allegations of racism and disagreement with performance evaluations cannot reasonably support the conclusion that her discharge was motivated by racial animus to withstand a Rule 50 judgment as a matter of law); *Nichols v. Lewis Grocer*, 138 F.3d 563, 570 (5th Cir. 1998) (plaintiff's self-serving testimony that her sex motivated her employer's action is of little value in deciding a motion for judgment as a matter of law); *Elliott v. Group Med. & Surgical Serv., et al.*, 714 F.2d 556, 564 (5th Cir. 1983), *reh'g denied*, 721 F.2d 819 (5th Cir. 1983), *and cert. denied*, 467

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[3]The Eleventh Circuit also cites the testimony of Dr. Brian Walters and Pamela McDaniel regarding Mr. Weiss' performance as a medical technologist as supporting Mr. Weiss' position that he competently performed his job. (App. at 3). According to the Eleventh Circuit, this evidence refuted REN's argument that it terminated Mr. Weiss for poor performance. However, REN terminated Mr. Weiss for his poor performance as a **supervisor**, not as a medical technologist. Therefore, this testimony is not relevant to REN's legitimate, non-discriminatory reasons for terminating him. Nevertheless, in order to withstand REN's motion for judgment as a matter of law, Mr. Weiss was required to submit proof of pretext for <u>each</u> of REN's proffered reasons for terminating him. While arguably Mr. Weiss did not sufficiently dispute his poor performance as a supervisor, this appeal addresses the insufficiency of evidence considered by the Eleventh Circuit in deciding that Mr. Weiss did not harass his subordinates and co-workers.

U.S. 1215 (1984) (generalized testimony by an employee regarding his subjective belief that his discharge was the result of discrimination is insufficient to make an issue for the jury in the face of proof showing a nondiscriminatory reason for his discharge); *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 984-85 (7th Cir. 1999) (employee's self-serving statements about his ability are insufficient to contradict the employer's negative assessment of that ability); *Perfetti v. The First Nat'l Bank of Chicago*, 950 F.2d 449, 458 (7th Cir. 1992), *cert. denied*, 505 U.S. 1205 (1992) (employee's self-serving contradiction of a detail of employer's testimony could not support the jury verdict); *Stevens v. St. Louis Univ. Med. Ctr.*, 97 F.3d 268, 272 (8th Cir. 1996) (employee's self-serving testimony that her actions would not have warranted dismissal absent her filing of a sex discrimination charge fails to carry plaintiff's burden of proving pretext); and *Babbar v. Ebadi*, 216 F.3d 1086 (10th Cir. 2000) (plaintiff's own opinions about his qualifications and the employer's anti-Hindu animus were not sufficient to create a material factual dispute).

In addition, the Eleventh Circuit's decision is inconsistent with the holding of this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). In *Reeves*, this Court held that in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record, and "give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000), *citing*, 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2529, p. 300 (2d ed. 1995). However, in reviewing the district court's order granting judgment as a matter of law, the Eleventh Circuit stated that it was only required to consider the evidence in the light most favorable

to Mr. Weiss and to accept his version of the disputed facts in the case. (App. at 3). This decision, which specifically ignored the undisputed, unimpeached evidence of the movant, is in direct conflict with *Reeves*.

The Eleventh Circuit's decision that a discrimination plaintiff's self-serving testimony alone will create a jury question, despite undisputed, unimpeached contradictory evidence of no discrimination, sets an unfortunate precedent that this Court is called upon to recognize and remedy. In effect, the Eleventh Circuit held that the self-serving denials by Mr. Weiss of REN's legitimate non-discriminatory reasons for terminating him were enough to establish that REN lied about those reasons. Allowing this decision to stand would effectively enable every plaintiff who files a discrimination lawsuit to take his or her claim before a jury based only on his or her self-serving testimony denying the employer's legitimate non-discriminatory reasons for the adverse employment action. Such a precedent would create a maelstrom of litigation based on nothing more than the denial of an interested litigant.

If the Eleventh Circuit had applied *Reeves* and the teaching from other circuits that a plaintiff's self-serving testimony alone is not enough to create a jury question, then the court would undoubtedly have affirmed the judgment for REN and this case would not have been remanded for a new trial. In the second half of its decision affirming the district court's conditional order granting a new trial, the Eleventh Circuit did review the *entire* record, including the undisputed evidence in favor of REN, the majority of which came from disinterested third parties. (App. at 5-7). The undisputed, unimpeached facts presented by REN in support of its legitimate non-discriminatory reasons for terminating Mr. Weiss, include the following:

- Mr. Weiss received three warnings regarding his job performance;
- Mr. Weiss was twice suspended in conjunction with these warnings;
- Mr. Weiss was counseled by Dr. Brian Walters regarding his religious conversations;
- There was an unpleasant encounter between Mr. Weiss and Mary Piccola, his supervisor, wherein Mr. Weiss raised his voice to Ms. Piccola and struck his hand on her desk;
- Mr. Weiss offered an unsolicited Christian Bible to Jahved Quershi, a Muslim co-worker and subordinate of Mr. Weiss;
- Mr. Weiss knew that Mr. Quershi was a practicing Moslem and prayed regularly;
- Mr. Weiss pointed out a Biblical passage from Romans ostensibly denouncing homosexuality to an openly homosexual subordinate employee;
- Mr. Weiss laid hands on co-workers in an attempt to heal them;
- At least one subordinate or co-worker filed a complaint claiming he or she had been offended by Mr. Weiss' discussion of religion;
- Mr. Weiss was aware of REN's policy against harassment of any type and Mr. Weiss admitted that as a supervisor it was his duty to maintain a harassment-free work environment; and
- REN was genuinely concerned about Mr. Weiss' harassment, took efforts to address the complaints of harassment it received and sincerely believed that Mr. Weiss was harassing its employees.

(App. at 5-7). If the Eleventh Circuit had considered this undisputed evidence of poor performance, insubordination and harassment as part of its Rule 50 analysis in the first part of its opinion, it would have affirmed the judgment as a matter of law for REN. Mr. Weiss' self-serving testimony alone should not be enough to create a jury issue in light of the evidence in favor of REN's legitimate non-discriminatory reasons for terminating him.

II. CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THERE IS A CONFLICT IN THE CIRCUITS WITH RESPECT TO WHEN AN EMPLOYMENT DISCRIMINATION PLAINTIFF WILL BE REQUIRED TO SUBMIT EVIDENCE IN ADDITION TO A PRIMA FACIE CASE AND PRETEXT, IN ORDER TO SURVIVE A MOTION FOR JUDGMENT AS A MATTER OF LAW.

In *Reeves*, this Court noted that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, will not *always* be adequate to sustain a jury's finding of liability. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000). This Court asserted that there would be instances when although the plaintiff has established a prima facie case and set forth evidence to reject the employer's explanation, "no rational factfinder could conclude that the action was discriminatory." *Id.* One example given by this Court for when this might occur is the situation where the plaintiff creates a weak issue of pretext and there is "abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* This Court stated that whether judgment as a matter of law is appropriate in a case will depend on a variety of factors, including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other

evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.*

The fact that evidence of a prima facie case and pretext will not always be enough to create a jury question has created conflict in the circuits which have rendered different decisions post-*Reeves* regarding when such a situation will occur. *See Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 93-94 (2nd Cir. 2001) (stating that a *case-by-case* examination is warranted to determine whether the prima facie showing plus pretext allows a finding of intentional discrimination); *Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000) (stating that if the plaintiff proves a prima facie case and pretext her claim must go to a jury unless there is *evidence that precludes a finding of discrimination*, i.e., if no rational factfinder could conclude that the action was discriminatory); *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001), *reh'g and reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001) (stating that a case will get to a jury if a plaintiff has proved her prima facie case and has presented sufficient evidence of pretext and there are no *unusual circumstances* that would prevent a rational factfinder from concluding that the employer's reasons for the adverse employment action taken against her were discriminatory). Finally, in the Eleventh Circuit, in light of the dearth of evidence cited as support of pretext in this case, a weak prima facie case and minimal evidence of pretext (solely consisting of plaintiff's self-serving testimony) will always be adequate to withstand a Rule 50 motion for judgment as a matter of law.

Concurring with this Court's opinion in *Reeves*, Justice Ginsburg recognized that a potential conflict might arise as a result of this portion of the decision. She described the potential conflict as follows:

> I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond [a prima facie case and pretext] in order to survive a motion for judgment as a matter of law. . . . Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). But the inference remains - unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law . . . that discrimination could not have been the defendant's true motivation.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 154-155 (2000).

This is exactly the "appropriate case" referred to by Justice Ginsburg. With this case, this Court has the opportunity to define more precisely the circumstances in which a plaintiff will be required to submit evidence in addition to a prima facie case and pretext to survive a motion for judgment as a matter of law. If Mr. Weiss can get to a jury based only on the self-serving evidence cited by the Eleventh Circuit, there is no real case-by-case analysis espoused by this Court in *Reeves*, and judgment as a matter of law is nonexistent in employment discrimination cases. Assuming arguendo that Mr. Weiss presented a prima facie case and evidence of pretext, when considering the undisputed evidence supporting REN which may properly

be considered at this juncture (which the Eleventh Circuit failed to consider), it is clear that *at best* Mr. Weiss presented a weak issue of pretext (his self-serving testimony) and there is undisputed, uncontradicted evidence that no discrimination occurred. *See* Outline of REN's undisputed facts at p. 10 herein. This is a case where the plaintiff's evidence is not adequate to sustain a jury's finding of liability. The teaching from *Reeves* has to be that plaintiffs need more evidence than Mr. Weiss had to get to a jury. This Court should grant certiorari in this case to resolve the conflict in the circuits, foreseen by Justice Ginsburg, regarding when an employment discrimination case is not appropriate for a jury.

CONCLUSION

This case presents important questions regarding the role of a plaintiff's self-serving testimony in an employment discrimination case. There is a conflict in the circuits regarding the efficacy of such evidence. For this reason, review by this Court is warranted. In addition, this case is important in light of this Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.* Guidance by the Court is needed regarding the application of the *Reeves* holding to cases where the evidence of a prima facie case and/or pretext is weak or is rebutted by substantial undisputed evidence by an employer. For this reason as well, review by this Court is warranted. This Court should grant certiorari to review these important matters, reverse the Eleventh Circuit's decision regarding REN's motion for judgment as a matter of law and enter judgment on behalf of REN consistent with the order in the district court.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14355

D.C. Docket No. 94-06333-CV-NCR

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAR 08 2001

THOMAS K. KAHN
CLERK

KENNETH WEISS,

Plaintiff-Appellant,

versus

REN CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Entered: March 8, 2001

Before EDMONDSON, BLACK and MCKAY[1], Circuit Judges.

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[1]Honorable Monroe G. McKay, U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

Appellant Kenneth Weiss appeals the district court's grant of Appellee REN Laboratories' post-trial motion for judgment as a matter of law and, in the alternative, the district court's grant of Appellee's motion for a new trial. Appellant seeks reinstatement of the jury verdict and remand for entry of judgment, as well as an award of costs and attorney's fees. Appellant brought suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, claiming religious discrimination was the cause of Appellant's termination from employment with Appellee. The jury returned a verdict in favor of Appellant. While we reverse the district court's grant of judgment as a matter of law, we affirm the district court's grant of a new trial and remand for a new trial.

I. JUDGMENT AS A MATTER OF LAW

This Court reviews de novo a district court's grant of judgment as a matter of law, applying the same legal standards as those used by the district court. *See Taylor v. Runyon*, 175 F.3d 861, 865 (11th Cir. 1999).

Judgment as a matter of law is warranted "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue . . . ." Fed. R. Civ. P. 50(a)(1). We have explained:

> If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted. Conversely, if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions, then such a motion was due to be denied and the case was properly submitted to the jury.

Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989) (footnote omitted). "The question is whether or not reasonable jurors could have concluded as this jury did based upon the evidence presented." *Quick v. Peoples Bank of Cullman County*, 993 F.2d 793, 797 (11th Cir. 1993) (quoting *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 679 n.1 (11th Cir. 1984)). In making this assessment, we consider the evidence in the light most favorable to the non-moving party, here, Appellant. *See Combs v. Plantation Patterns*, 106 F.3d 1519 1526 (11th Cir. 1997). In considering a grant of judgment as a matter of law, a court may not weigh the evidence or assess the credibility of witnesses. *See Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 439 (11th Cir. 1996).

We conclude reasonable jurors could have found, by a preponderance of the evidence, that (1) Appellant satisfactorily performed his job, (2) he did not harass his co-workers, and (3) religion made a difference in Appellee's decision to terminate Appellant.[2] We reach this conclusion due to the requirements under the judgment as a matter of law standard that we not weigh the evidence and that we consider the facts in the light most favorable to Appellant.

Under this standard, we are bound to accept Appellant's version of the disputed facts in this case. With respect to Appellant's competence in performing his job, we must accept Dr. Brian Walter's testimony that Appellant was a "technically sound . . . medical technologist." We also must accept Pamela McDaniel's testimony that all laboratory employees make mistakes "once in a while," and that Appellant is "an accurate and good technical employee."

With respect to whether Appellant harassed his co-workers, the standard of review requires that we accept Appellant's assertion that he never discussed religion with a co-worker when Appellant knew or should have known that such a discussion was offensive to that individual. We

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[2]This is the three-part, special verdict delivered by the jurors here.

also must accept the following of Appellant's statements: Jahved Quershi, a Moslem co-worker and, later, subordinate of Appellant, rejected Appellant's offer of a Bible saying "no thank you," and Appellant did not insist Quershi take the Bible; Appellant never told Jane Christy, an openly homosexual co-worker, that she would burn in hell or that he would cure her homosexuality; co-workers with whom Appellant prayed consented to or requested their praying together and were not offended by Appellant's behavior; and Appellant's only interaction with Claudette Cannatella at the farewell party was his agreeing with Virginia Savino's remark that "it's good to attend church."

With respect to whether religion made a difference in Appellant's termination, we must accept Appellant's testimony that he believed he was terminated because of his religion.

Viewing the facts in the light most favorable to Appellant, and absent any weighing of evidence, we reverse the district court's grant of judgment as a matter of law for Appellee.

II. NEW TRIAL

The standard we use in reviewing the grant of a motion for a new trial differs markedly from that in reviewing the grant of a motion for judgment as a matter of law. First, as a general matter, we review motions for a new trial under the abuse of discretion standard. *See, e.g., Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987). Where the district court has granted a motion for a new trial, "our review is broader and requires a stringent application of the [abuse of discretion] standard" in order "to protect the litigant's right to a jury trial." *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984).

Second, while a court reviewing a motion for judgment as a matter of law may not weigh the evidence, a court reviewing a motion for a new trial is permitted to weigh the evidence. *See Bazile v. Bisso Marine Co., Inc.*, 606

F.2d 101, 105 (5th Cir. 1979) (citation omitted).[3] A new trial is warranted if the jury verdict is contrary to the great weight of the evidence. *See Rosenfield,* 827 F.2d at 1497-98; *Williams v. City of Valdosta,* 689 F.2d 964, 973 (11th Cir. 1982). In weighing the evidence, courts must examine both the evidence favoring the moving party and that favoring the jury verdict. *See id.* A court may conclude a jury verdict is contrary to the great weight of the evidence even if the record contains some evidence supporting the jury verdict. *See Ard v. Southwest Forest Indus.,* 849 F.2d 517, 521 (11th Cir. 1988). Courts reviewing motions for a new trial, therefore, are afforded much greater leeway in assessing evidence than are courts reviewing motions for judgment as a matter of law. *See Dudley v. Wal-Mart Stores, Inc.,* 166 F.3d 1317, 1320 n.3 (11th Cir. 1999) (the law applies a less stringent standard to motions for a new trial than to motions for judgment as a matter of law).

In weighing the evidence here, we need not look any further than the undisputed facts in this case. *See generally Ard,* 849 F.2d at 521. With respect to Appellant's competence in performing his job, it is uncontroverted that Appellant received three warnings regarding his job performance. These warnings were issued on October 5, 1992 (failed to perform a hepatitis test), February 17, 1993 (reported an incorrect HIV result), and July 14, 1993 (left his shift early). It is also undisputed that these three warnings were written. It is uncontroverted that Appellant was twice suspended in conjunction with warnings (February 17, 1993 and July 14, 1993). The parties agree that, in August 1992, Appellant was counseled by Dr. Walters regarding, at least in part, his religious conversations ("sex, religion, and politics are best kept out of the workplace"). Many of these incidents occurred after Appellant's promotion in November 1992. Further, the parties agree that there was an

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[3]*In Bonner v. City of Prichard),* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

unpleasant encounter between Appellant and Mary Piccola on July 21, 1993. While most of the details about this encounter are disputed, the parties agree Appellant raised his voice to his superior and struck his hand on her desk.

With respect to whether Appellant harassed his co-workers, both parties agree that Appellant offered a Christian Bible to Jahved Quershi, a co-worker and, later, a subordinate of Appellant. While Appellant testified that Quershi politely declined the Bible, Appellant also knew that Quershi was a practicing Moslem and prayed regularly. Appellant should have known that a practicing Moslem would, at the very least, not appreciate Appellant's unsolicited offer of a Christian Bible. With his knowledge of Quershi's religion, Appellant's gesture takes on tones of proselytization.

The parties are also in agreement that Appellant pointed out a Biblical passage from *Romans* regarding homosexuality to Christy, an openly homosexual subordinate employee. The Biblical passage Appellant cited indisputably views homosexuality in a negative light, calling homosexuality "vile," "unseemly," "erro[neous],"and requiring "recompence [sic]".[4] Since Appellant's discussion of homosexuality was admittedly couched in this non-approving framework, it follows that Appellant's portrayal of homosexuality was negative and, therefore, inappropriate in a work setting. Appellant's behavior is particularly unacceptable when directed toward subordinates, such as Quershi and Christy, since Appellant should have known his subordinates might not object to their supervisor's overtures, concerned that he might penalize them.

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[4]Appellant testified he cited a passage from "Roman I," and there is only one passage in the first chapter of *Romans* that refers to homosexuality. The full passage reads: "For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet." *Romans* 1:26-27 (King James).

Next, the parties agree that Appellant "laid hands" on co-workers in an attempt to heal them. Specifically, Appellant testified that, on at least two occasions, he unsolicitedly asked sick co-workers if he could pray for or with them.[5] Initiating a prayer session in a place of employment - even if co-workers agree to participate - is not prudent behavior. Co-workers may have felt pressured to acquiesce to Appellant's overture to "lay hands" on them. The workplace is a highly inappropriate setting to be making such overtures in the first place, especially without knowledge of the religious inclinations of one's co-workers.

Finally, both parties agree that Appellant's supervisors informed him on April 21, 1993, that at least one co-worker had filed a complaint, claiming he or she had been offended by Appellant's discussion of religion.

We conclude the jury's verdict that religion made a difference in Appellant's termination is contrary to the great weight of the evidence, which strongly suggests Appellant was terminated for poor job performance, insubordination, and religious harassment of co-workers, as alleged by Appellee. We reach this conclusion after considering Appellant's self-serving testimony that he was terminated because of his religion.

III. CONCLUSION

"If the appellate court reverses the judgment [as a matter of law], nothing in this rule precludes it from determining that the appellee is entitled to a new trial . . . ." Fed. R. Civ. P. 50(d). Viewing the facts in the light most

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[5]One incident involved Pamela McDaniel and Mary Piccola, and the other involved a unidentified woman "with blood in her eye". While Appellant portrays these two prayer sessions as consensual, Joan Caruso testified that, in a separate incident, Appellant unsolicitedly placed his hands on her with the intent of healing her. Appellant allegedly did so after Caruso mentioned to employees in a lounge that she had a migraine headache. Appellant did not recall this alleged incident.

favorable to Appellant and refraining from weighing evidence, as we must, we conclude the district court erred in granting Appellee's motion for judgment as a matter of law. Focusing on the undisputed facts and weighing the evidence, we conclude, however, the district court did not abuse its discretion in granting Appellee's motion for a new trial. We emphasize we do not take a position on the propriety of granting a motion for judgment as a matter of law or a motion for a new trial following the new trial ordered here. The subsequent trial will generate a new record and may reveal new evidence, thereby demanding a different result than that reached here.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED FOR A NEW TRIAL.

81 FEP Cases 73
81 Fair Empl.Prac.Cas. (BNA) 73
(Cite as: 1999 WL 976072 (S.D.Fla.))

KENNETH WEISS,
Plaintiff

v.

REN LABORATORIES OF FLORIDA,
Defendant

No. 94-6333-CIV-ROETTGER

U.S. District Court Southern District of Florida

Entered: September 24, 1999

BNA Labor Relations Reporter Headnote -
FEP Cases
CIVIL RIGHTS ACT OF 1964 Religion -- Discharge
C 108.1118 C108.1180
S.D.Fla., 1999.

Employer lawfully discharged born-again Christian employee who was harassing co-workers about their personal lives and religious beliefs, since it had legal duty to keep its workplace free of harassment, and it produced abundant evidence that he repeatedly condemned two heterosexual and two homosexual female co-workers about their lifestyles, he continually tried to convert Muslim subordinate, he attempted to "lay hands" on employees without their permission, he gave out unsolicited Bibles, and he harassed new employee on her first day about her religious practices; employer was genuinely concerned about his harassment in that its handbook proscribes harassment of any type, electronic mail message from corporate office directed manager to instruct him that employer did not tolerate harassment of any kind and that such conduct must cease, and it repeatedly warned him that his discussions were unwelcome.

WEISS v. REN LABORATORIES OF FLORIDA
81 FEP Cases 73
BNA Labor Relations Reporter Headnote - FEP Cases
CIVIL RIGHTS ACT OF 1964 Religion -- Discharge
C108.1118 C108.1180
S.D.Fla., 1999.

Mere denial by born-again Christian employee, who was discharged following complaints that he was harassing other employees on basis of religion, that his religious discussions were harassing in nature is not sufficient to cast doubt on employer's motive for discharge; he produced no evidence that employer did not honestly believe that he was harassing its workers and no testimony or exhibit that would demonstrate weakness, implausibility, inconsistency, incoherency, or contradiction in its stated reason.

WEISS v. REN LABORATORIES OF FLORIDA
81 FEP Cases 73
BNA Labor Relations Reporter Headnote - FEP Cases
CIVIL RIGHTS ACT OF 1964 Religion -- Discharge
C108.1118
S.D.Fla., 1999.

Abundant evidence supports assertion by employer that it discharged for insubordination born-again Christian employee who continually harassed co-workers about their personal lives and religious beliefs, where its management counseled him several times about unwelcome and disruptive nature of his actions yet he did not modify his behavior, he was personally insubordinate to supervisor when he made angry table-pounding response to her attempt to counsel him about leaving his shift early, and his only evidence of pretext was his own denial that he had commented on one co-worker's religion and testimony of another employee that this co-worker did not appear upset by comment that she should attend church more often; his evidence is not sufficient to overcome considerable evidence of insubordination.

WEISS v. REN LABORATORIES OF FLORIDA
81 FEP Cases 73
BNA Labor Relations Reporter Headnote - FEP Cases
CIVIL RIGHTS ACT OF 1964 Religion -- Discharge
C108.1118 C108.7212
S.D.Fla., 1999.

Jury verdict in favor of discharged born-again Christian medical technologist was so contrary to evidence of his harassing, disruptive, and insubordinate behavior that new trial would be warranted if federal district court's judgment as matter of law in favor of employer is overturned, where employer promoted him after it was fully aware of his religious beliefs and after it had cautioned him about religious harassment, but he thereafter continued to harass several employees about their sexual preferences, dating habits, living arrangements, and personal faiths and continued to disregard company policy, and he did not meaningfully dispute material facts bearing on employer's intent; he condemned two female homosexual co-workers on basis of religion to point that one contemplated suing employer for harassment, he condemned two female heterosexual employees for their dating habits and living arrangements, he repeatedly held unwanted religious discussions with Muslim employee who often felt compelled to leave room and even considered resigning, he ignored several informal warnings from management, he received written warning for failing to run blood specimen for hepatitis and written warning and suspension for reporting incorrect HIV result, he attempted to lay hands on unwilling employees, he disrupted work by praying over broken machine rather than calling repairman, he received another written warning and suspension for leaving his shift early when staff was overwhelmed with work, he was belligerent and hostile to supervisor, and he harassed new employee on first day of work about her religious practices.

WEISS v. REN LABORATORIES OF FLORIDA
81 FEP Cases 73

William O. Solms, Jr. (Solms & Price, P.A.), Miami, Fla., for plaintiff.

Steven D. Brown (Williams, Mullen, Christian and Dobbins), Richmond, Va., for defendant.

Full Text of Opinion

BARRY S. SELTZER, Magistrate Judge

*1 THIS MATTER is before the Court on Defendant's Motion for Judgment as a Matter of Law or in the Alternative a New Trial. (DE 206.) Kenneth Weiss ("Plaintiff") claimed that Ren Laboratories of Florida, Inc. ("Defendant") terminated his employment on July 23, 1993 "solely due to his religious beliefs," in violation of Title VII of the Civil Rights Act of 1964, as amended. Pursuant to the consent of the parties, the undersigned conducted the trial of this matter on February 8 through February 11, 1999, following which the jury returned a verdict for Plaintiff.

Defendant moved for judgment as a matter of law at the close of Plaintiffs case-in-chief, at the close of all the evidence, and following the jury's verdict. The Court deferred ruling on the motions and, following the verdict, informed the parties that it would entertain full briefing on the motions. On April 9, 1999, Defendant filed its Memorandum of Law in Support of Defendant's Motion for Judgment as a Matter of Law or in the Alternative a New Trial. On May 30, 1999, Plaintiff filed his opposition memorandum, and on May 10, 1999, Defendant replied thereto.

Having reviewed the parties' respective memoranda and thoroughly considered the record herein, the Court finds that Plaintiff failed to introduce substantial evidence to permit a reasonable factfinder to conclude that two of Defendant's proffered reasons for termination--religious

harassment and insubordination - - were not what motivated its conduct. Accordingly, the Court GRANTS Defendant's Motion for Judgment as a Matter of Law. Further, should this judgment be reversed, the Court conditionally GRANTS Defendant's Motion for a New Trial as the jury verdict was against the great weight of the evidence.

I. STATEMENT OF FACTS

On February 8, 1999, the Court commenced the trial. Both parties presented opening statements to the jury, followed by their respective cases-in-chief and by a brief rebuttal. Plaintiff's presentation consisted of four lay witnesses, including Plaintiff Weiss, and one expert; only the four lay witnesses testified to liability issues. Defendant's presentation consisted of eight witnesses; only six of the witnesses testified to liability Issues. [FN1]

> FN1. Plaintiff's expert witness (Dr. John R. Williams) and two of Defendant's witnesses (Diana Bryzicki and Alice Bering) testified to damages issues only. Their testimony, therefore, is not relevant for purposes of this Order.

A. Plaintiff's Case-In-Chief

1. Virginia Savino

Virginia Savino is Plaintiff's former wife. They were married in July 1993, just prior to Plaintiff's termination, and divorced in July 1997. Savino testified about a discussion involving herself, Plaintiff, and Claudette Cannatella on July 22, 1993, the day preceding Plaintiff's termination. This was Cannatella's first day of work, and she had met Plaintiff for the first time that evening. According to

Savino, she commented on the cross that Cannatella was wearing. Cannatella reportedly responded that she did not attend church regularly but should do so. Savino stated that Plaintiff voiced agreement. In Savino's opinion, Cannatella did not appear to be upset.

2. Pam McDaniel

Pam McDaniel was the only member of Defendant's management team to be called during Plaintiff's case-in-chief. As the former day shift supervisor, she knew Plaintiff well. McDaniel's testimony revealed the following details of Plaintiff's religious harassment of co-workers, subordinates, and supervisors:

*2. Plaintiff harassed several gay employees, including Joan Caruso and Jane Christy, on the basis of religion, and they complained to McDaniel in the Summer/Fall of 1992 and the Spring of 1993;

- Plaintiff repeatedly held unwelcomed religious discussions with Javed Quershi, a Muslim employee, and Plaintiff failed to stop when requested to do so; Plaintiff then attempted to give him a Bible, which he refused; Quershi complained to McDaniel about this harassing conduct;
- in August 1992, McDaniel was present with Jackie Creola for an oral warning given to Plaintiff about unwanted religious discussion with co-workers;

- in November 1992, Defendant promoted Plaintiff from medical technologist to evening shift supervisor due to his good technical skills, despite the previous oral counseling about religious harassment;
- in February 1993, Plaintiff prayed over a broken coagulant machine instead of calling the service repairman, which unnecessarily disrupted the work for the following shift;
- in April 1993, McDaniel and Mary Piccola (the laboratory manager) orally counseled Plaintiff after they had received several employee complaints about his religious harassment; Plaintiff, however, did not take the warning seriously, sarcastically inquiring whether he was permitted to talk about baseball with employees; Piccola gave Plaintiff a written warning regarding his harassing conduct;
- several co-workers and subordinates were afraid to complain about Plaintiff because he was their supervisor and, therefore, could affect the terms and conditions of their employment;
- on July 21, 1993, Plaintiff became violent and insubordinate toward Piccola at a counseling session attended by McDaniel; Plaintiff pounded his fist and appeared to be going over a desk to strike Piccola; Piccola touched his face to keep from getting hit; thereafter, McDaniel was afraid to be in the same room with Plaintiff.

McDaniel testified that Defendant permitted non-harassing speech in the workplace, as long as it did not interfere with the job. Employees, including Plaintiff, who engaged in consensual religious discussions were neither counseled nor disciplined. But McDaniel stated that many of Plaintiff's conversations about religious matters were not consensual; they were harassing and offensive, requiring Defendant's intervention.

3. Claudette Cannatella

Cannatella testified that on her first day at work she was introduced to Plaintiff at a farewell party for another employee, and she was informed that he (Plaintiff) was the night supervisor. According to Cannatella, Plaintiff commented upon her crucifix and then proceeded to inquire whether she was a Christian and whether she attended church. Cannatella replied that she was a Catholic and had not been to church for a long time. Plaintiff then repeatedly urged her to attend church. According to Cannatella, Plaintiff just went "on and on," making her feel uncomfortable. On her way home from work that evening, Cannatella called Debbie Correggio, a supervisor, and asked whether she would have to deal with such harassment on a daily basis. Correggio conveyed the complaint to Mary Piccola, the laboratory manager. Piccola later inquired of Cannatella about the incident.

4. Plaintiff Kenneth Weiss

*3 Plaintiff testified that he became a born-again Christian in 1977 and between 1989 and 1991 received the "baptism of the Holy Spirit." Plaintiff testified that as a born-again Christian he believes that he is required to witness and share his religious beliefs with others, including co-workers.

On July 16, 1992, Plaintiff was hired by Defendant as a medical technologist on the evening shift at its Fort Lauderdale laboratory. He admitted receiving an employee handbook and stated that he was familiar with and understood its provisions concerning acceptable workplace conduct. He acknowledged that he was required to comply with Defendant's policies and procedures, including its anti-harassment policy. He never complained to Defendant that its policies and procedures conflicted with his religious beliefs.

Soon after going to work for Defendant, Plaintiff began discussing his religious beliefs with co-workers, subordinates, and supervisors and giving unsolicited Bibles. He admitted showing Jane Christy, an openly gay subordinate employee, biblical passages concerning homosexuals. Plaintiff also attempted to "lay hands" on people at work to pray for them, and he did "lay hands" on a broken coagulant instrument during Ids shift in front of other employees.

Plaintiff admitted that his August 1992 he was orally counseled by Dr. Brian Walters, who told him that "sex, religion, and politics are best kept out of the workplace." In 1992, he also received a written warning for failing to perform a hepatitis test. Nonetheless, in November 1992, Defendant promoted Plaintiff to a supervisory position.

Plaintiff acknowledged that as a supervisor he was in a position to evaluate employees, approve raises, and authorize terminations. Furthermore, he was a role model for other employees and was responsible for maintaining a harassment-free workplace. Yet, in his supervisory capacity, he received a written warning and suspension for reporting out an incorrect HIV result in February 1993. And he acknowledged an April 1993 counseling with Mary Piccola and Pam McDaniel, at which time they informed him of a complaint from an employee who had been offended by his religious discussions. Plaintiff apologized and stated that it would not happen again. Plaintiff denied that Piccola had showed him an e-mail from Defendant's headquarters,

stating that the company did not tolerate harassing behavior. Plaintiff acknowledged that a few months after the April counseling, he received a written warning and suspension for leaving his shift early on July 14,1993. Finally, Plaintiff admitted that at a July 21, 1993 meeting with Piccola and McDaniel he slammed his hand down on the table.

Plaintiff also testified about the events concerning Claudette Cannatella at the July 22, 1993 farewell party. He stated that his wife. Virginia Savino, had questioned Cannatella about the cross around her neck and that Cannatella did not appear to be upset. According to Plaintiff, when he came to work the following day, Piccola terminated him.

*4 Weiss believes that he was terminated solely because of his religion. He bases his conclusion upon the capitalized word "RELIGION" in the termination notice. Among other things, the notice states that Plaintiff was terminated for "discussing RELIGION with other employees." He stated that his claim for religious discrimination pertained only to his July 23, 1993 termination.

Weiss testified that he recognized there is a time and place for religious discussion. He stated that he never discussed religion when he knew it was offensive to others. He denied ever receiving a written warning that his religious activities might affect his employment. He also denied telling Jane Christy, an openly gay employee, that she would burn in hell. And he denied commenting on Cannatella's cross or the church she attended.

Following Plaintiff's testimony, he rested his case. Defendant moved for judgment as a matter of law and this Court deferred argument and reserved ruling. Defendant then proceeded to its case-in-chief.

B. Defendant's Case-In-Chief

1. Evelyn Roby

Roby was a supervisor during Plaintiff's employment at Defendant's laboratory. Roby testified that she personally had several consensual conversations with Plaintiff about religion. But Roby further testified to witnessing Plaintiff initiate unwelcomed and harassing religious discussions with Jane Christy and Carol Kelsy in the laboratory lunchroom. According to Roby, she witnessed Plaintiff telling Christy, one of his subordinates, that according to the Bible she was going to go to hell because she was gay. Christy became very upset at Plaintiff's comment and stated that she was going to inform Piccola. Furthermore, Plaintiff upset Carol Kelsy by condemning her dating habits; he did so "every time he talked to her." Kelsy reportedly also took her grievances to Piccola.

2. Javed Quershi

Javed Quershi is a Muslim employee who worked in very close proximity to Plaintiff, both as a co-employee and as his subordinate. Quershi testified that most of the time Plaintiff spoke to him about his religion; Plaintiff would condemn all other faiths. Quershi stated that he repeatedly attempted to stop Plaintiff, but Plaintiff refused to stop. On one occasion, Plaintiff handed Quershi a Bible, which Quershi refused. Quershi testified that he was offended by and resented Plaintiff's incessant, unwelcomed expressions of religious faith. As Quershi explained: "What you need to understand you are trying to get your work done and he constantly pounding, pounding, pounding, you know, the only way was to get out of the room for a couple of minutes." Because Plaintiff refused to stop, Quershi ultimately brought his complaints about Plaintiff's harassing conduct to Pam McDaniel in the Fall of 1992 and

to Mary Piccola in 1993. According to Quershi, had Defendant not taken some action to stop Plaintiff's religious harassment, he (Quershi) would have quit his job.

3. Joan Caruso

Joan Caruso was an inventory technician on the day shift at the time Plaintiff was the evening shift supervisor. Because Caruso was working a substantial amount. of overtime, she and Plaintiff would often be at the laboratory at the same time. Caruso testified about several harassing experiences she had had with Plaintiff. According to Caruso, Plaintiff would come by her office and initiate unwelcomed religious discussion three or four times per week. She stated that Plaintiff had told her that she was going to go to hell because she was a homosexual and that God did not love her. Plaintiff had also told her that he was a prophet and that she should change her lifestyle to be right with God. Against her wishes, he even attempted to lay hands on her to cure her headaches. According to Caruso, the discussions made her "feel horrible,. . . . like [she] was being prosecuted for something that was really none of Ken Weiss' business." Although she repeatedly told Plaintiff that she did not wish to discuss religion with him, he persisted. He stopped only after she threatened to call the company's telephone number for reporting harassment.

*5 Caruso also testified to witnessing Plaintiff harass Lisa Styles and Jane Christy (Caruso's roommate). On at least a dozen occasions, Plaintiff told Lisa Styles that she was living in sin and that God did not approve. Styles finally reacted by bluntly informing Plaintiff that it was none of his business. Styles also complained to McDaniel.

According to Caruso, she and others were initially reluctant to complain to management about Plaintiff's harassment because he was a supervisor. Notwithstanding this reluctance, Caruso did complain to Jackie Creole in the Fall of 1992, to Mary Piccola in 1993, and to Pam McDaniel on several occasions in 1992 and 1993. She specifically

informed Piccola that Plaintiff had called her "an abomination." She testified that if Defendant had not put an end to Plaintiff's harassment, she would have sued the company for allowing it to continue and not protecting her rights.

4. Dr. Brian Walters

Dr. Brian Walters is the director of microbiology and immunology at Defendant's laboratory. According to Dr. Walters, Pam McDaniel had received complaints from staff members about Plaintiff discussing religion in an excessive manner. He testified that he warned Plaintiff in August 1992 about his unwelcomed expressions of religious faith to various coworkers. Dr. Walters told Plaintiff it was not a good idea to talk about sex, religion, and politics in the workplace. Dr. Walters stated that Plaintiff agreed with him and was apologetic. Shortly thereafter, in November 1992, Defendant promoted Plaintiff to evening shift supervisor.

5. Debbie Correggio

Debbie Correggio has worked for Defendant for nine years as a laboratory coordinator. Correggio testified that she had received a call from Claudette Cannatella at approximately 10:00 p.m., on July 22, 1993. Cannatella was upset because Plaintiff had reportedly been pushy about her not attending church on a regular basis and about the cross she wore around her neck. According to Correggio, Cannatella was bothered by Plaintiff's religious discussions and wanted to know if she was "going to have to deal with [similar comments from Plaintiff] every day." Correggio stated that she relayed Cannatella's complaints to Mary Piccola, the laboratory manager, because she considered the matter serious.

Mary Piccola

Mary Piccola was hired as a vice president of operations at Defendant's laboratory in January 1993 and was responsible for all issues arising in the workplace. Piccola made the final decision to terminate Plaintiff in July 1993.

Piccola testified about Defendant's employee handbook, policies, and procedures, including the company's anti-harassment policies. Piccola stated that she spoke to Plaintiff on several occasions about complaints she had received from staff members concerning his religious harassment. Piccola testified that Plaintiff personally offered her a Bible in February 1993, which she declined to accept; Plaintiff, however, refused to take it back. Plaintiff also asked if he could lay hands on her to cure her cold; Piccola declined. Piccola told Plaintiff that he could discuss religion with those who were willing to do so but that he could not discuss religion with those who indicated that they did not wish to do so. She warned Plaintiff that he could be terminated if he did not stop harassing those not wishing to partake in these discussions.

***6** Piccola identified an e:mail that she received from Defendant's corporate headquarters concerning the proper way to handle Plaintiff's harassing conduct. The e:mail was prompted by Pam McDaniel's report that Plaintiff had been harassing staff members. The human resources personnel at corporate headquarters instructed Piccola to speak to Plaintiff immediately to stop the harassment; otherwise, Defendant risked liability. Piccola and McDaniel (in April 1993) then met with Plaintiff. Piccola told Plaintiff that corporate policy prohibited his harassing employees. She reiterated that he could engage in consensual religious discussions but could not discuss religion with those who indicated that they did not wish to do so. And she again warned Plaintiff that he could be terminated if he continued to harass.

Piccola related a July 1993 incident in which Plaintiff had left his shift early, even though a significant amount of work remained. Plaintiff was suspended for his breach of policy, and he received a written warning for it on July 21, 1993. Piccola and McDaniel then met with Plaintiff to discuss the suspension. According to Piccola, Plaintiff slammed his fist down on the desk, frightening her and making her jump. Piccola stated that she and Plaintiff stood up and that she was unable to leave the room. At several times, she told Plaintiff that he needed to leave. The incident so startled McDaniel that she would not return to talk to Plaintiff. The following day, Piccola, this time accompanied by Andrew Grant, met with Plaintiff again. Piccola informed Plaintiff that his violent behavior would not be tolerated; Plaintiff apologized.

On July 23, 1993, Debbie Correggio advised Piccola that Plaintiff reportedly had been discussing religion aggressively with Claudette Cannatella. Piccola spoke to Cannatella, who stated that she did not want to come to work every night and be forced to deal with such religious discussions; they made her feel very uncomfortable. Piccola then discussed Cannatella's complaint with Plaintiff to verify the allegations. Piccola testified that Plaintiff did not deny discussing religion with Cannatella. According to Piccola, the Cannatella incident was "a recurrence of a problem that had been discussed many times with [Plaintiff]."

Piccola stated that Plaintiff's termination was based not solely on his conversation with Cannatella, but on his on-going religious harassment, as well as his insubordination and poor performance. With respect to the termination notice that she prepared, Piccola testified that her practice is not to list every reason on the notice because the employee file references prior warnings and counselings. She explained that she wrote "RELIGION" in capital letters on the notice because Plaintiff had been counseled several times that he could not engage in unwanted or unwelcomed religious discussions, yet he

continued to do so anyway; the Cannatella incident was merely the last straw. Finally, she testified that her termination of Plaintiff had nothing to do with his being a born-again Christian or with any of the consensual religious discussions he may have had with other employees.

*7 At the conclusion of Piccola's testimony, Defendant rested its case. Defendant then renewed its motion for judgment as a matter of law, arguing that the record contained no evidence of intentional religious discrimination. This Court again deferred argument and reserved ruling.

C. Plaintiff's Rebuttal Case

Plaintiff was the only witness who testified during his rebuttal case. He was asked approximately ten questions by his counsel, and defense counsel conducted no cross-examination. His rebuttal testimony addressed whether he should have been disciplined for leaving work early in July 1993 and for calling a physician on a panic value reading in the early morning hours. Plaintiff also testified that he always obeyed and allowed the rules of the laboratory and never signed a written warning concerning his harassing employees.

After Plaintiff rested, Defendant again renewed its motion for judgment as a matter of law, and this Court again deferred argument and ruling. The parties then proceeded to closing argument, and the Court instructed the jury.

The jury returned a verdict in favor of Plaintiff. Defendant again moved for judgment as a matter of law. The Court stated that it would not then require Defendant to place all of its reasons on the record and requested that the parties prepare a briefing schedule for all post-trial motions.

II. STANDARD OF REVIEW

Pursuant to Rule 50 of the Federal Rules of Civil Procedure, a judgment as a matter of law is warranted if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). A court reviewing a motion for judgment as a matter of law must

> consider all the evidence, and the inferences drawn therefrom, in the light most favorable to the nonmoving party. If the facts and inferences point overwhelming in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion [is] properly granted. Conversely, if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach different conclusions, then such a motion [is] to be denied. . . .
>
> Combs v. Plantation Patterns, 106 F.3d 1519, 1526 [73 FEP Cases 232] (11th Cir. 1997), cert. denied. 522 U.S. 1045, 118 S.Ct. 685, 139 L.Ed.2d 632 [77 FEP Cases 448] (1998) (quoting Carter v. City of Miami, 870 F.2d 578, 581 [49 FEP Cases 1014] (11th Cir. 1989) (emphasis added). Accordingly, the nonmoving party "must provide more than a mere scintilla of evidence to survive a motion for judgment as a matter of law"; "there must be a substantial conflict in the evidence to support a jury question." Id. (quoting Carter, 870 F.2d at 581) (internal quotation marks omitted).

Here, Plaintiff's religious discrimination claim is grounded in circumstantial evidence. Under the framework established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 [5 FEP Cases 965] (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct 1089, 67 LEd.2d 207 [25 FEP Cases 113] (1981), Plaintiff had the initial burden of establishing a prima facie case of discrimination. Combs, 108 F.3d 1527-28 (citations omitted). Establishing a prima facie case creates a presumption of unlawful discrimination. Id. at 1528 (citation omitted). The effect of the presumption is to shift to the defendant the burden of producing legitimate nondiscriminatory reasons for the challenged employment action. Id. (citations omitted). Once the defendant satisfies this intermediate burden of production, the presumption of discrimination drops from the case. Id. at 1528 (citation and quotation marks omitted). The plaintiff then has the opportunity to come forward with evidence "sufficient to permit a reasonable factfinder to conclude" that the defendant's explanation is pretextual. Id.

***8** "Pretext . . . means a lie, specifically a phony reason for some action." Helland v. South Bend Community Sch. Corp., 93 F.3d 327, 330 [71 FEP Cases 1621] (7th Cir. 1996), cert. denied, 519 U.S. 1092, 117 S.Ct. 769, 138 L.Ed.2d 715 [74 FEP Cases 1440] (1997) (citation and internal quotation marks omitted). "Because a Title VII claim requires intentional discrimination, the pretext inquiry focuses on whether the employer's stated reason was honest, not whether it was accurate." Id. As articulated by this Circuit, the focus is on whether "the employer's proffered legitimate reasons were not what actually motivated its conduct." Combs, 106 F.3d at 1538 (citing Cooper - Houston v. Southern Ry. Co., 37 F.3d 603, 605 [73 FEP Cases 291] (11th Cir. 1994)). The "court must evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate

reasons for its action that a reasonable factfinder could find them unworthy of credence. "Id. (citation and internal quotation marks omitted). If the (nonmoving) plaintiff does not "undermine the veracity of [the defendant's] claimed reliance" on its stated reason(s), then the defendant is entitled to judgment as a matter of law. Id. at 1544 (Black, J., concurring).

Where the record does not support granting a judgment as a matter of law, it may nonetheless support granting a new trial if the jury verdict is contrary to the "great weight" (not merely the greater weight) of the evidence. See Rosenfield v. Wellington Leisure Prods., Inc., 827 F.2d 1493, 1497-98 [44 FEP Cases 1523] (11th Cir. 1987); Williams v. City of Valdosta, 689 F.2d 984, 973 (11th Cir. 1982); Arnold v. Rayonier, Inc., 181 F.R.D. 549, 553 (S.D. Ga. 1998). The law applies "a less stringent standard. . . to a motion for a new trial than to a motion for judgment as a matter of law." Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1320 n.3 [79 FEP Cases 136] (11th Cir. 1999) (citation omitted). And unlike motions for judgment as a matter of law, motions for a new trial permit courts to weigh or reexamine the evidence. See Rabun v. Kimberly-Clark Corp., 678 F.2d 1053, 1060 (11th Cir. 1982); Arnold, 181 F.R.D. at 553. In weighing the evidence, courts examine not only the evidence favoring the jury verdict, but the evidence favoring the moving party as well. Williams, 689 F.2d at 973. Courts, however, may not substitute their own credibility choices and inferences for those of the jury. Id. at 973-74 n.7; Arnold, 181 F.R.D. at 553.

After weighing the evidence, a court may conclude that a jury verdict is contrary to the great weight of the evidence--thereby warranting a new trial-- even though the record does contain some evidence supporting the verdict. See Ard v. Southwest Forest Indus., 849 F.2d 517, 521 [47 FEP Cases 407] (11th Cir. 1988) (district court properly granted new trial in age discrimination case; although plaintiffs had introduced some evidence showing that employer's proffered reason for discharge was pretextual,

the evidence was weak and attenuated). But in assessing a new trial motion, a court must give greater deference to a jury verdict where the case involved "simple issues, highly disputed facts, and . . . an absence of 'pernicious occurrences.'" Williams, 689 F.2d at 974. By contrast, a trial court has greater freedom to independently evaluate a jury verdict where the case involved "complex issues, facts not highly disputed, and events arguably marred by error. "Id.

III. ANALYSIS

A. Judgment as a Matter of Law

*9 Assuming, arguendo, that Plaintiff established a prima facie case of religious discrimination, the production burden shifted to Defendant to proffer legitimate, nondiscriminatory reasons for the July 23, 1993 termination. Defendant proffered that it terminated Plaintiff for religious harassment and insubordination, [FN2] both of which are legitimate, nondiscriminatory reasons. See, e.g., Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1019-1020 [72 FEP Cases 747] (4th Cir. 1996), cert denied, 522 U.S. 815, 118 S.Ct. 58, 139 L.Ed.2d 21 [74 FEP Cases 1792] (1997) (upholding termination of Evangelical Christian for "sending personal, distressing letter to coworkers' homes, criticizing them for assertedly ungodly, shameful conduct"; plaintiff supervisor had acknowledged responsibility to "promote harmony in the workplace"); Helland, 93 F.3d at 330 (defendant's claims that plaintiff's performance was poor and he defied repeated warnings against interjecting his religious beliefs into the classroom were legitimate, nondiscriminatory reasons to defeat plaintiff's claim of religious discrimination); Fouraker v. Publix Super Markets, Inc., 959 F.Supp. 1504 (M.D. Fla. 1997) (plaintiffs failure to follow employer's directive to cease certain conduct was considered insubordination and a legitimate, nondiscriminatory reason for termination); Woodbury v. Sears

Roebuck & Co., 901 F. Supp. 1560, 1564 (M.D. Fla. 1995) (insubordination is a legitimate, nondiscriminatory reason for termination).

> FN2. Defendant also proffered that it terminated Plaintiff for poor performance. The Court, however, need not address this issue as Plaintiff failed to undermine the veracity of Defendant's other stated reasons for the termination. See Combs, 106 F.3d at 1543 (a plaintiff must discredit "all" of the defendant's reasons for its actions).

Once Defendant satisfied its production burden, "the presumption of discrimination drop[ped] from the case and the factual inquiry proceed[ed] to a new level of specificity." Combs, 106 F.3d at 1528 (citation omitted). To prevent entry of judgment as a matter of law, Plaintiff was then required to put forth sufficient evidence showing that each of Defendant's proffered reasons for the termination was not "the real reason for the adverse employment decision." Id. (citations omitted). Plaintiff, however, failed to do so.

Defendant produced abundant evidence supporting its assertion that it terminated Plaintiff for religious harassment: he repeatedly condemned two homosexual women (Caruso and Christy) (one of whom was his subordinate) and two heterosexual women (Kelsy and Stiles) about their personal lifestyles; he continually tried to convert a Muslim subordinate (Quershi); he attempted to lay hands on employees; he gave unsolicited Bibles (and refused to take one back); and he harassed a new employee (Cannatella) on her first day at work about her religious practices. Plaintiff's behavior put Defendant in a position of possibly losing employees to resignation or, worse, being sued by employees for tolerating a religiously hostile work environment.

Defendant had not any the right, but a legal duty to keep its workplace free of religious harassment. See Weiss v. United States, 595 F.Supp. 1050, 1055- 58 [36 FEP Cases 1] (E.D. Va. 1984) (employee prevailed on claim of hostile work environment religious harassment based upon discriminatory comments/conduct by co-workers and supervisor); EEOC Decision Number 72- 1114, 4 FEP Cas. (BNA) 842, 843 (1972), 1972 WL 4024, at *1 (EEOC Feb. 18, 1972) (charging parties claimed that supervisor was preaching his religious beliefs to them at work; EEOC stated that "employer is responsible for the actions of its supervisors. . . Respondent's failure to provide a working environment free of religious intimidation is violative of Section 703(a) of Title VII.")).

*10 The evidence established that Defendant was genuinely concerned about Plaintiff's harassment. Defendant's own handbook proscribes harassment of any type, and the record contains ample testimony from Piccola, McDaniel, and even Plaintiff himself that workplace harassment was well understood to be unacceptable at the laboratory. Defendant's concern was also evidenced by an e:mail forwarded to Piccola by the corporate office. The e:mail directed Piccola to instruct Plaintiff that Defendant does not tolerate harassment of any kind and that such conduct must cease.

The evidence further established that Defendant took efforts to address the many complaints of harassment it received. Plaintiff admitted that he was counseled by Dr. Walters in the Fall of 1992 to avoid religious discussions and that he was told by Piccola in April 1993 of a complaint about his religious harassment, for which he apologized. Pam McDaniel testified that she was involved in a counseling session with Plaintiff as early as August 1992 regarding this very issue. And both Piccola and McDaniel testified to counseling Plaintiff in April 1993; they informed him of several complaints by subordinates and co-workers regarding his unwelcomed, harassing religious discussions. Piccola stated that she had also cautioned Plaintiff on other occasions. These repeated warnings not only placed Plaintiff on notice, but they underscore the sincerity of Defendant's concern. When

Defendant finally terminated Plaintiff, it cited the harassing discussions and the previous warnings in the termination notice.

Plaintiff failed to cast sufficient doubt on the veracity of Defendant's assertion that it terminated him for religiously harassing employees. Plaintiff produced no evidence to suggest that Defendant did not honestly believe he was harassing its workers. Plaintiff did not produce any testimony or exhibit that would demonstrate a weakness, implausibility, inconsistency, incoherency, or contradiction in Defendant's stated reason. See Combs, 106 F.3d at 1538. And although Plaintiff denied that his religious discussions were harassing, his mere denial, standing alone, is insufficient for a reasonable jury to find that Defendant's proffered reason for terminating him was a pretext for religious discrimination. See Washington v. Vogel, 880 F.Supp. 1542, 1544 (M.D. Fla. 1995) (mere denial by driver stopped by police officer that he committed traffic violation was insufficient by itself for reasonable jury to find that traffic stop was pretext for national origin discrimination). Were it otherwise, any plaintiff could "get to the jury" on a discrimination claim simply by denying the defendant's stated reason for its action. Id. As this Circuit has stated, "[that the plaintiff calls into question some assertions made by the defendant in support of defendant's justification is not enough. The plaintiff must call into question the veracity of the defendant's ultimate justification itself. "Isenbergh v. Knight -Ridder Newspaper Sales, 97 F.3d 436, 444 [72 FEP Cases 735] (11th Cir. 1996), cert. denied, 521 U.S. 1119, 117 S.Ct. 2511, 138 L.Ed.2d 1014 [74 FEP Cases 1791] (1997) (citation omitted) (emphasis added). Nor does Plaintiff's stated belief that he was terminated "solely due to his religious beliefs" affect the result. "Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [the defendant] has offered extensive evidence of legitimate, nondiscriminatory reasons for its actions." Id.

*11 Defendant also introduced abundant evidence supporting its assertion that it terminated Plaintiff for insubordination. Defendant's management counseled Plaintiff on several occasions about his inappropriate religious discussions in the workplace, but the warnings went unheeded. Not only did Plaintiff disregard several informal warnings from management, but he also disregarded Piccola's more formal directive of April 21, 1993 to cease his religious harassment. Piccola cited Plaintiff's continued disregard of these warnings, which culminated in his harassment of Cannatella, as evidence of his insubordination. She memorialized this in the termination notice: "[D]espite at least 2 separate warnings, Mr. Weiss continues to discuss RELIGION with REN employees." Further, Plaintiff was personally insubordinate to Piccola--as evidenced by his angry, table-pounding confrontation--when she attempted to counsel him about his leaving the shift early.

Plaintiff failed to cast doubt on the veracity of Defendant's assertion that it terminated him for insubordination. The only evidence presented by Plaintiff was his own denial that he commented on Cannatella's church and cross and Savino's testimony that Plaintiff had merely voiced his agreement that Cannatella should attend church more often and that Cannatella did not appear to be upset. Although Plaintiff may disagree with the wisdom of Defendant's assessment of his religious discussion with Cannatella, his disagreement does not establish pretext. As this Circuit has stated, a plaintiff "may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where . . . the reason is one that might motivate a reasonable employer." Combs, 106 F.3d at 1543. In Defendant's view, Plaintiff's conversation with Cannatella, coming only a day after his angry confrontation with Piccola, manifested a continuing disregard for company policy; it was the last straw. Plaintiff, therefore, failed to produce any evidence showing that the claim of "insubordination" was a front or ruse for unlawful religious discrimination. See Isenbergh, 97 F.3d at 444.

To establish pretext, Plaintiff had to adduce "substantial evidence," see Combs, 106 F.3d at 1526, showing that Defendant "did not honestly believe in its proffered explanation" that it terminated Plaintiff for religious harassment and insubordination. Arnold, 181 F.R.D. at 557 (citing Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 [56 FEP Cases 1246] (11th Cir. 1991) (stating that the inquiry is "whether the employer gave an honest explanation of its behavior")). Plaintiff, however, failed to produce any evidence from which a rational factfinder could find that Defendant's stated "reasons were not what actually motivated its conduct." Combs, 106 F.3d at 1538 (citation and internal quotation marks omitted). Accordingly, judgment as a matter of law is warranted.

B. New Trial

*12 Should this judgment be reversed, this Court would grant Defendant's motion for a new trial because the jury verdict was contrary the great weight of the evidence. [FN3] Here the great weight of the evidence shows that Plaintiff was terminated, not because of his religion, but because of his religious harassment of co-workers and subordinates and for insubordination. The evidence shows that after it was fully aware of Plaintiff's religious beliefs, and even after it had cautioned him about religious harassment, Defendant promoted Plaintiff to a supervisory position. But the evidence further shows that he thereafter continued to religiously harass several employees about their sexual preferences, dating habits, living arrangements, and personal faiths and that he continued to disregard company policy.

FN3. Federal Rule of Procedure 50(c)(1) states in pertinent part:

> If a renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial.

The record contains the following evidence of Plaintiff's workplace behavior:

- he condemned two female homosexual employees on the basis of religion, telling one that she would bum in hell and calling her "an abomination"; that employee contemplated suing Defendant had they not stopped the harassment;
- he condemned two female heterosexual employees on the basis of religion, critizing their dating habits and living arrangements;
- he repeatedly held unwanted religious discussions with a Muslim employee in which he condemned all faiths other than his own; the Muslim employee often felt compelled to leave the room to end the discussions and even considered resigning his job;

- he received oral warnings in August 1992 (from McDaniel and Jackie Creola), In the Fall of 1992 (from Dr. Walters), and again in April 1993 (from McDaniel and Piccola) regarding unwanted religious discussions with co-workers and subordinates; he also received several informal warnings from Piccola;
- he received a written warning in October 1992 for failing to run a blood specimen for hepatitis during his shift;
- he received a written warning and suspension in February 1993 for reporting an incorrect HIV result;
- he attempted to lay hands on unwilling employees;
- he disrupted work in February 1993 by praying over a broken coagulant machine rather than calling a service repairman;
- he received a written warning and suspension in July 1993 for leaving his shift early when the staff was overwhelmed with work;
- he was belligerent and hostile to Piccola during a July 21, 1993 meeting; and
- he harassed a new employee on her first day at work about her religious practices.

Plaintiff did testify that his religious discussions were not harassing, and he disputed the merit of his warnings and suspensions. But the issue that was dispositive of this case was neither simple nor the subject of highly disputed testimony. The dispositive issue was the complex one of Defendant's

intent – whether Defendant terminated Plaintiff because it intended to discriminate against him on the basis of his religion or because it honestly believed he had been insubordinate and religiously harassing employees. And the facts material to the issue of Defendant's intent were not highly disputed: Plaintiff did commit the acts giving rise to the suspension; Plaintiff did discuss religion in the workplace with some frequency; at least some employees did take offense and reported their displeasure to management; and management did express its concern to Plaintiff by warning him about this behavior. See Williams, 689 F.2d at 974 (court has greater latitude in reviewing jury verdict where issues are complex and facts not highly disputed). Plaintiff, therefore, did not meaningfully dispute the material facts bearing on Defendant's intent and its stated reasons for termination.

*13 The great weight of the evidence supports Defendant's assertion that it terminated Plaintiff, not because of his religion, but because it honestly believed that he had been religiously harassing other employees and had been insubordinate to management. See Arnold, 181 F.R.D. at 557. Accordingly, the Court concludes that a new trial would be warranted should the judgment be reversed. See Fed. R. Civ. P. 50(c)(1).

IV. CONCLUSION

For the foregoing reasons, the evidence of record did not allow a reasonable jury to find that Defendant's proffered legitimate, nondiscriminatory reasons were not the real reasons for Plaintiff's termination. Accordingly, the Court GRANTS Defendant's Motion for Judgment as a Matter of Law. Further, should this judgment to be vacated, this Court conditionally GRANTS Defendant's Motion for a New Trial as the jury verdict was contrary to the great weight of the evidence.

DONE AND ORDERED at Fort Lauderdale, Florida this 24th day of September 1999.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14355-CC

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAY 2 1 2001

THOMAS K. KAHN
CLERK

KENNETH WEISS,

Plaintiff-Appellant,

versus

REN CORPORATION,

Defendant-Appellee.

.....

On Appeal from the United States District Court for the Southern District of Florida

.....

Entered: May 21, 2001

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19 _, _____ F.2d _____).

Before: EDMONDSON, BLACK and MCKAY*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5) the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ S. Black
UNITED STATES CIRCUIT JUDGE
*Honorable Monroe G. McKay, U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

ORD-42 (6/95)

Supreme Court, U.S.
FILED
SEP 21 2001
CLERK

NO. 01-292

IN THE
SUPREME COURT OF THE UNITED STATES

REN LABORATORIES OF FLORIDA, INC.,
Petitioner,

v.

KENNETH WEISS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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September 20, 2001

QUESTIONS PRESENTED

I. In a religious discrimination case, where the employer has asserted as a defense that the plaintiff employee was discharged for "religious harassment" of co-workers in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, and the question whether "religious harassment" occurred was a mixed one of fact and law, is the jury's assessment of conflicting witness versions of the alleged harassment subject to being overturned by entry of judgment as a matter of law for the employer?

II. When is an employment discrimination plaintiff required to submit evidence in addition to a prima facie case and pretext, in order to survive a motion for judgment as a matter of law under FED. R. CIV. PROC. 50?

PARTIES TO THE PROCEEDINGS

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Respondent's parent corporation is Gambro Healthcare, Inc., f/k/a Gambro Healthcare Patient Services, Inc., f/k/a REN Corporation - USA. There are no other known parent or subsidiary entities to these parties. There is no publicly held company that owns 10% or more of Respondent's stock.

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BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

KENNETH WEISS respectfully files this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner REN Laboratories of Florida, Inc., seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Weiss v. REN Laboratories, Inc.*, 251 F.3d 161, dated March 8, 2001, that reversed the United States District Court for the Southern District of Florida's entry of judgment as a matter of law against Petitioner after a jury verdict in Petitioner's favor, but upheld the District Court's contingent grant of a new trial.[1] Respondent believes certiorari is not called for, insofar as Petitioner's Questions Presented misstate the trial record, the issues raised therein were adequately addressed by this Court last session in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and no real conflict exists among the Circuit Courts on the application of the *Reeves* standard for judgment as a matter of law.

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[1] Respondent Kenneth Weiss has also filed a Petition for Writ of Certiorari, seeking review of the Eleventh Circuit's conditional grant of a new trial and clarification of the standard for assessing whether "religious hararssment" in violation of Title VII has occurred in a workplace. Sup.Ct. No. 01-217. Respondent raises issues in his Petition which are separate from those raised in REN Laboratories' Petition, although they arise out of the same predicate claims and defenses presented in the lower courts. Respondent urges that if the Court grants certiorari to Petitioner, certiorari should also be granted to Respondent, in view of the fact that the question whether "religious harassment" occurred is a mixed one of fact and law, and the law in this area is in need of clarification from the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

TITLE VII of the CIVIL RIGHTS ACT OF 1964:

42 U.S.C. § 2000e Definitions (2000). For the purposes of this title [42 U.S.C. §§ 2000e *et seq.*] –

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2 (2000). Unlawful employment practices. (emphases supplied):

(a) Employer practices. It shall be an unlawful employment practice for an employer--

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, sex, or national origin;

* * * *

(m) Impermissible consideration of race, color, *religion*, sex, or national origin in employment practices. Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, *religion*, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

Introduction.

This is a Title VII religious discrimination case. The jury returned a verdict in favor of Respondent, finding that he was discharged as a result of the practice of his religion ("religion made a difference" in Petitioner's decision to terminate Respondent). The magistrate trial judge granted judgment as a matter of law and alternatively a new trial on the basis that the evidence was insufficient to support the jury verdict.

The Eleventh Circuit Court of Appeals reversed the judgment as a matter of law, concluding that reasonable jurors could have found for the Plaintiff based on a preponderance of the evidence. Appendix to Petition for Writ ("App.") at 3. However, the court also affirmed the conditional order granting a new trial on the basis that the verdict was against the great weight of the evidence. App. at 7.

Factual History.

Every material issue of fact was disputed at trial, including the factual basis for the termination. The case went to trial by consent before United States Magistrate Judge Barry S. Seltzer on a Title VII religious discrimination claim. Respondent's Amended Complaint alleged that he was discharged from his employment with Petitioner based on his religion. (R. 1/28/1.) Respondent was first employed by Petitioner as a medical technician. It was not substantially disputed that Respondent was qualified for his job and performed it satisfactorily. Respondent received a Bachelor of Science degree in biology from the University of New York and a Medical Technologist Degree from St. Jude Hospital. He obtained a national board registry for medical technology and is a member of the American Society of Clinical Pathology. (R. 8/214/120-21.)

Respondent was employed by REN July 14, 1992. (R. 9/215/215.) Pam McDaniel, Respondent's supervisor before he was promoted, admitted that Respondent was "an accurate and

good technical employee." (R. 7/216/112.) She also admitted that Respondent was not "an aggressive harsh person," but to the contrary he was "mild mannered." (R. 7/216/112.) She also agreed that displays of anger would be out of character for Respondent. (R. 7/216/126.) Dr. Brian Walters, scientific director for REN and hence Respondent's supervisor, agreed that Respondent was "technically sound as a medical technologist." (R. 10/217/106.)

Thus, in November 1992 Respondent was promoted to night shift supervisor. Before Respondent was terminated in July 1993, he was given two written warnings regarding substantive job performance (unrelated to religion), one before his promotion in October 1992 (R. 10/217/100,) and one after his promotion in February 1993. (R. 8/214/140.) The October 1992 warning was given by Dr. Walters, and was the only time he had occasion to counsel Respondent regarding employment related issues (R. 10/217/107.) Dr. Walters downplayed the significance of the event saying that "these things happen." (R. 10/217/102.) The February 1993 warning involved a blood test done for AIDS in which Respondent reported the wrong results. McDaniel agreed that all lab employees made mistakes and that even she had received written warnings for mistakes as a lab employee. (R. 7/216/111.)

Respondent told the jury that he was a "born again" Christian. He stated that it changed his life, giving him meaning and a purpose that he did not have before: Christianity fulfilled him. (R. 8/214/123.) Respondent held an interest not only in his own specific religious faith, but also in learning of the faiths of others. As a result of his background and beliefs, discussing religion and religious subjects interested him. Thus, for Respondent it was natural to talk about religion. However, he told the jury that he knew there was "a time and place for it." He noted he had never been fired or disciplined for discussing religion prior to being an employee at REN. He explained that he had talked about it in prior employment situations, in appropriate settings, without any conflicts. (R. 8/214/126-27; 135-36.)

Respondent testified that his faith required him to share his beliefs with others when appropriate. (R. 9/216/223.) He testified

he never continued to discuss religion or his faith with anyone when he knew it was offensive to that person. (R. 8/214/137.) He explained that his approach to other people in regard to religious beliefs was to be "gentle and diplomatic," and that he would not try to force his religious beliefs on someone if they did not want to listen to him. (R. 8/214/137; 181-82.) Respondent knew that REN employed people of other faiths and beliefs, including Moslems, Jews, atheist, and agnostics, and he would speak to them about their beliefs. He informed the jury, however, that those individuals never complained about those discussions. (R. 8/214/136-37.)

Respondent would also openly pray and offer prayer for others. He testified that prayer was important in every aspect of his life, and part of the practice of his faith. (R. 10/217/146.) For instance, Respondent told the jury that once when Mary Piccola and Pam McDaniel informed him they felt ill, they allowed him to pray for them, holding their hands during prayer. (R. 8/214/137.)[2] Neither told him that they were offended. (R. 8/214/139.) On another occasion, Respondent prayed for a co-employee who got hepatitis-infected blood in her eye. The employee consented to the prayer. (Respondent also advised her to see a physician.) (R. 8/214/138-39.)

REN attempted to portray this type of prayer as disruptive and bizarre. For instance, REN brought out an incident through McDaniel involving a coagulant machine that broke during Respondent's shift. Instead of calling a service technician to get the machine fixed, as she alleged Respondent was supposed to, she testified that Respondent only "prayed over" the machine, and then left it broken. (R. 7/216/138-39.) Respondent's version of events was much different. He explained that the machine malfunctioned around 2 or 3 a.m, and he and another employee attempted to fix

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[2] This touching during prayer was described as "laying hands on," a description much more dramatic than the actual conduct. (R. 8/214/137-38.) Piccola in fact admitted she allowed the prayer, but denied the touching. (R. 10/217/200-201.)

the machine according to company procedures, to no avail. One of the employees suggested he pray, and so he did. (R. 8/214/140-42.) Since the machine continued to malfunction, Respondent informed the jury that he followed REN procedures which required him to notify Mary Piccola of the malfunction by e-mail, and then Piccola would have the machine fixed the next day. (R. 8/214/140-42.) There was no evidence introduced of any discipline taken against Respondent over this incident.

Respondent also, in the practice of his faith, gave Bibles to co-workers. (R. 8/214/146.) He never received any negative comments regarding this practice. (R. 8/214/147.) He said that people would receive the Bible and say thank you, with the exception of Jahved Quershi, a Moslem co-worker, who rejected his offer. (R. 8/214/146-47.) However, Respondent testified that he did not insist that Quershi take the Bible, and that Quershi merely said "No thank you." Respondent also testified that he gave a Bible to Mary Piccola and that she received it and thanked him. (R. 8/214/147.) *Respondent never received any written warnings regarding any aspect of the practice of his faith, with the exception of the notice of termination dated July 23, 1993.* (R. 8/214/148.)

It was uncontradicted that REN allowed its employees to discuss religion on the job. (R. 7/216/134.) It was also uncontradicted that no REN employee other than Respondent was disciplined for discussing religion on the job. (R. 7/216/123.) With that factual backdrop, the evidence of discrimination against Respondent chiefly turned upon his termination notice:

> Despite at least two separate warnings, *Ken continues to discuss RELIGION with REN employees*. Claudette Cannatella expressed her concern and discomfort to her immediate supervisor, Debbie Correggio, regarding Ken Weiss discussing what church she attended. When she said NONE, Ken gave her a lecture.

Plaintiff's Exhibit 6a, App. at G1. (emphasis of "all caps" in original.)

On its face, the termination unequivocally stated Respondent was terminated for *discussing religion*. Respondent also showed that the factual assertions contained in the notice were subject to dispute as well: there were not "two separate warnings" and Respondent did not engage in a "lecture" of Claudette Cannatella regarding the church she attended.

The jury heard three versions of the Claudette Cannatella conversation: that version provided by Respondent and his former wife, Virginia Savino; that provided by Cannatella; and that provided by Piccola in her termination notice. Savino testified that she went to a surprise party at REN one night in July 1993 held in honor of the departure of the receptionist, Francesca Garcia. (R. 7/216/63, 67.) When Garcia came into the room with her replacement, Cannatella, she came to Respondent and Savino and introduced them. Garcia then invited Respondent and Savino to come to her church, explaining that she was singing in the choir. Savino told her that they attended church on Sundays, but would attend if they could. (R. 7/216/67-69.) Savino then noticed a crucifix being worn by Cannatella, and asked her what church she attended. Cannatella responded that because she went out on Saturday nights, she didn't get up on Sunday mornings, "but I really should go." Savino replied: "Yeah, its good for everybody to go," and Respondent *then* made his one and only statement to Cannatella: "Yeah, its good for everybody to go." Cannatella then said "Nice to meet everyone," and moved on. (R.7/216/68-69.)

Respondent's version was similar. After Garcia and Cannatella introduced themselves, Savino commented about how pretty her crucifix was. Cannatella thanked her, and Savino then asked what church she attended. Cannatella said "I'm a Roman Catholic, but I'm not attending any church right now." Savino offered that "It's good to attend church... if you're a Christian you should go," to which Cannatella replied, "Yes, you're right." Respondent *then* simply said "Yes," agreeing with Cannatella. Cannatella and Garcia then moved on. (R. 8/214/187-88.)

Cannatella's version was different, creating an issue of fact for the jury to resolve. Cannatella was hired July 22, 1993, and as of the time of trial, she was still employed at REN six years later. (R.

8/214/93.) She recalled the conversation regarding Garcia singing in the choir, but also recalled that it was Respondent who asked about her crucifix, not Savino. (R. 8/214/99.) She also recalled being asked a series of questions, including whether she was a Christian, which church she attended, and when did she last attend church. Cannatella said this part of the conversation only lasted "a few minutes." (R. 8/214/101-105.) But, after she left work that night, she called Deborah Corregio, her friend and supervisor, and the person who got her the job. (R. 8/214/106.) She told Corregio of the conversation, and asked whether she was "going to have to deal with this on a daily basis." (R. 8/214/106.) The next morning Corregio told Piccola. (R. 10/217/143.) When she came in the next day, Cannatella was called into Mary Piccola's office. Piccola told her that she wouldn't "have to worry about [Respondent] bothering you anymore, ***he was terminated***." (R. 8/214/106-107.) Cannatella was "shocked." (R. 8/214/107.) Cannatella described Respondent as "mild mannered," and testified that, despite the "crucifix conversation," she saw no reason she wouldn't have been able to work with Respondent: "I don't think so, he was polite about it." (R. 8/214/108-109.)

Regarding the alleged two prior warnings, Respondent testified that the only written warning he had received regarding religious discussions and his practice of religion was the termination notice itself. (R. 8/214/147-48.) He also testified that the oral conversations he had with REN supervisors gave him no warning that talking about religion, giving out Bibles or praying in public, would result in his termination. (R. 8/214/148-49.) The testimony of McDaniel and Piccola pointed to only two salient events: an August 1992 meeting with Dr. Walters; and an April 1993 meeting between Piccola, McDaniel, and Respondent. (R. 7/214/137, 142.) The evidence before the jury, however, brought into question whether these were "warnings" at all, and whether Respondent had even harassed employees.

Pam McDaniel was the day shift supervisor, acting as the Quality Assurance director. (R. 7/216/103.) Before Respondent was promoted to night shift supervisor, she had some supervisory authority over Respondent. McDaniel testified that in August 1992

Respondent was counseled regarding "unwanted religious discussions." (R. 7/216/137-38.) Nonetheless, she also testified that Respondent's discussion of religion with other employees was not a problem until he was promoted to a managerial level. (R. 7/216/116.) The jury likewise heard from Dr. Walters, to whom McDaniel had referred the matter for investigation, that there was no substance to these allegations. (R. 10/217/91-92, 103.) In fact, *no one* on the laboratory staff corroborated the allegations of "excessive discussion of religion." (R. 10/217/103.) Dr. Walters testified that only because the allegations came from a supervisor (McDaniel), did he then talk to Respondent. Thus, Dr. Walters had a general discussion with Respondent indicating that the topics of "sex, religion and politics" didn't fit into the workplace. He said that he put the other two topics into his discussion because he "*didn't find anything*" in his investigation, and did not want to focus on one topic as opposed to others. (R. 10/217/103-106.) This was not a warning at all, and called into question McDaniel's credibility.

The only other "warning" received by Respondent came at a meeting between Piccola, McDaniel, and Respondent on April 21, 1993. Respondent testified that he was not informed at any time that his behavior regarding discussing religion could result in termination. (R. 8/214/148-49). At the April 21st meeting, they informed him of only one complaint, and they did not tell him who complained or what was said. Their description of the alleged offending conversation was vague, to the effect that the unnamed complaining party "didn't like [his] religious views." (R. 9/215/262-63.) Since he did not know who complained or about what, he asked them to apologize to that person because he didn't "want to offend anybody." (R. 9/215/263.)

McDaniel, however, said that there were multiple complaints from the Moslem co-worker, Jahved Quershi, and Jane Christy and Joan Caruso, presented as gay employees. (R. 9/215/142.) She and Piccola met with Respondent, and Piccola tried to emphasize "how serious these problems were." According to McDaniel, Respondent did not take the criticism seriously. (R. 7/216/146.) Piccola stated that at the meeting she reviewed all the complaints

with Respondent and gave Respondent a written warning, which he signed. (R. 11/218/218-19.) *That written warning, however, was not in Respondent's file.* (R. 11/218/253.) Dr. Walters, who was present at Respondent's termination meeting, testified that he was not aware of any written warning given to Respondent regarding discussing religion. (R. 8/214/122.) Again there was no verbal correction form documenting the "warning." Given Respondent's denial of receiving a written warning, coupled with this lack of documentation, a reasonable conclusion for the jury to have drawn was that not only was there never a written warning, but Piccola and McDaniel had lied about it to back up their reasons for Respondent's ultimate termination.

Quershi, a seven year employee of REN at the time of his testimony, testified that after a couple of religious discussions with Respondent, he asked Respondent to stop talking about religion, and that Respondent was trying to convince him that his religion was the best. (R. 10/217/55.) Quershi also testified about Respondent's attempted gift of a Bible. Quershi refused it and testified that it was offensive to him because he is a Moslem and that "I believe you should know it's very fanatic, I personally wouldn't accept any other religion but Moslem [sic]." (R. 10/217/56.) A fair inference here is that Quershi was hyper-sensitive to the discussion of any other religion but his. Respondent, however, recalled that he offered Quershi a Bible, and Quershi simply rejected it saying "No thank you." Respondent did not insist that Quershi take it, and Respondent did not have a lengthy discussion with him about it. (R. 8/214/146-47.) Respondent noted that Quershi, as a Moslem, prayed regularly, and so prayed on the job. He would leave his post at the appropriate time and go somewhere to pray. As far as Respondent knew, no one ever ridiculed Quershi for his religious practices. (R. 8/214/179.) Respondent thought he had a good working relationship with Quershi. (R. 8/214/185.)

Christy did not testify at trial, but Caruso did. Respondent did not recall Caruso at all, but did recall conversations with Christy. Respondent informed the jury that Christy, like other employees, would voluntarily approach him to talk about religion. Christy

informed him that she was a member of a homosexual church in Ft. Lauderdale. Respondent explained that he did not know that homosexuals had a church, and it intrigued him. He stated: "We would talk about that and one time I gave her a Bible and showed her a passage in there saying what the Bible says about the homosexual lifestyle." (R. 8/214/180.) Respondent denied ever telling her that she would "burn in hell," and denied that he ever told anyone that he was going to "cure their homosexuality." (R. 8/214/181.)

Caruso, an employee of REN since 1990, was quite clearly hostile toward Respondent. She related that Respondent approached her many times to talk to her about religion, but she would not talk to him. He would bring his Bible into her department, point out scriptures that would state different things about her lifestyle, and say that she was going to hell because she was a lesbian. She said that Respondent referred to himself as a "prophet." She said this happened 3 to 4 times a week. (R. 10/217/68-71.) However, Caruso worked the day shift, not the night shift as Respondent did, except during a period of time from the middle of 1992 through January or February 1993. (R. 10/217/85-86.) Even though her testimony was that she was no longer working late as of February 1993, she maintained that she continued to be harassed by Respondent between February and July 1993. (R. 10/217/86.) She did not explain this inconsistency.

Before the "crucifix conversation" with Claudette Cannatella, discussed above, there were two other events in mid-July 1993 which preceded Respondent's termination. The evidence was in conflict, but a reasonable view of the evidence supported Respondent's position. First, Respondent received a written warning and a two day suspension on July 14, 1993 for leaving his shift early the preceding day. The notice indicates that Respondent "Left the shift before testing was complete. Shift was overwhelmed with work and Ken did not help techs." Respondent explained that he would usually leave the lab at 3:00 a.m., which was the end of the shift. However, in general he would stay until he felt, in his professional opinion, that there were no problems and that whoever was left behind could finish the work and lock up the lab. He

testified that there was no requirement by Federal or Florida law that he had to be on the premises until the last technician left. However, the first time he received any warnings or discipline regarding leaving the night shift early was this written warning. (R. 8/214/167.) Significantly, Mary Piccola testified that she issued this written warning, instead of just an oral warning, because in her mind it was a serious offense for a supervisor to leave his shift unattended, in contravention of Florida law: she stated that the supervisor personally had to be on the shift. (R. 11/218/226-27.)

Nonetheless, the jury had already heard Dr. Walters testify earlier that that was incorrect.

> [T]hat's a grey area.... I got to be very honest with you here, sometimes the supervisor may leave before his shift, if all the work is in complete and there's a few specimens left over and he has made provisions with the people in the laboratory.... that's a call that we leave with that supervisor....

(R. 10/217/108-109.) In fact, Dr. Walters stated that the laboratory complied with Florida law simply by having a day shift supervisor who would be on call and available for consultation. In short, the inference which the jury could have reasonably drawn was that the two day suspension was unwarranted under REN's procedures, and that Mary Piccola singled out Respondent and disciplined him unfairly for another reason: because she did not like his religion.

The second event occurred about a week later, on July 21, 1993. Respondent, Piccola and McDaniel met to discuss generally Respondent's job duties. (R. 7/216/128.) Respondent testified that they told him they were increasing his duties, which he expressed he felt was unfair. (R. 8/214/167-68.) But he was primarily disturbed because he had learned when he returned from his suspension that Dr. Walters had taken over his shift, but had not been required to stay on premises (R. 8/214/268,) contrary to the reasoning behind Respondent's suspension and Piccola's directions to him. He confronted Piccola with this, and Piccola did not deny it. (R.

8/214/170-71.)

Respondent then demonstrated for the jury what happened next. He said "Mary, I won't put up with that," and then struck his hand on the desk for "dramatic" effect. He then said "I resent that, that Dr. Walters can leave and I have to stay." (R. 8/214/183.) Piccola's response was to stand up, come out from around the desk, grab his chin and throw him out of the office, saying "Get out of my face, get out of my face." Respondent told her she had no right to touch him, she let go and he left. (R. 8/214/155-56, 171.) On cross examination, Respondent agreed he was upset, but denied being enraged and denied blocking Piccola's way out of the office. (R. 8/214/270.) In fact, that same day he and Piccola met again, and they apologized and agreed to forget the entire incident. (R. 8/214/270-72.)

Piccola and McDaniel had different versions. Piccola denied grabbing or touching Respondent on his face, but because her written report mentioned she touched his chest, she conceded that must have occurred. (R. 11/218/230-33.) McDaniel however recalled that Piccola did touch his face. (R. 7/216/127.) Both Piccola and McDaniel testified generally that he reacted violently, and scared them. Piccola said Respondent blocked her exit from the office. (R. 7/216/147-49; 11/218/230-233.)

On cross examination Piccola admitted that she prepared a written document regarding the July 21st incident on July 23rd, *after* the termination notice was done. (R. 11/218/276.) On her document regarding the July 21st incident, in handwriting she noted that it wasn't given to Respondent because he "was terminated for another reason" (*i.e.*, "RELIGION").

As discussed earlier, the "crucifix conversation" lead to Respondent's discharge. The notice of termination, dated July 23, 1993, *only* mentioned religious discussions. Respondent testified that he was called into Piccola's office when he arrived that day. He was presented the notice without discussion, which he read and signed, and then he was escorted out of the building. (R. 8/214/152.)

Procedural History.

The trial court deferred all motions for judgment as a matter of law, and allowed the case to go to the jury. After four days of trial, the case was submitted to the jury. The jury was instructed in pertinent part as follows with respect to Respondent's charge of religious discrimination:

> As a matter of law, the Court instructs you that it is an unlawful employment practice for REN Laboratories to discharge Ken Weiss because of his religion. The term "religion" includes all aspects of Ken Weiss' religious observance and practice, as well as belief, unless REN Laboratories demonstrates that it is unable to reasonably accommodate Ken Weiss' religious practice without undue hardship on the conduct of REN Laboratories' business.
>
> More specifically, the Plaintiff alleges that he was terminated for discussing religious issues with people at REN Laboratories in an non-offensive manner.
>
> The Defendant denies that Mr. Weiss was terminated for discussing religion in a nonoffensive manner. REN claims that he was terminated for harassing the employees about his religion as well as for insubordination and unsatisfactory performance.
>
> In order to prevail on his claim, the Plaintiff must prove each of the following things by a preponderance of the evidence:
>
> 1. That he was a member of and/or practices a particular religion; and
> 2. That he was qualified for and satisfactorily performed the job at issue; and
> 3. That he suffered some adverse employment action; and
> 4. That someone outside the protected class of which he is a member was treated differently.

> [I]t is not necessary for the Plaintiff to prove that religion was the sole or exclusive reason for the Defendant's decision, it is only necessary for the Plaintiff to prove that religion made a difference.
>
> The parties agree that the Plaintiff was permitted to practice his religion in the workplace to the extent that he did not harass other employees. The parties further agree that the Defendant could lawfully discharge an employee for harassing other employees, for performing his tasks in an unsatisfactory manner, or for insubordinate behavior. It will be up to you, the members of the jury, to determine whether or not Plaintiff harassed other employees, performed his duties in an unsatisfactory manner or behaved in an insubordinate manner.

See Appendix to Petition for Writ of Certiorari in *Weiss v. REN Laboratories of Florida, Inc.*, Sup. Ct. No. 01-217, at E4 - E6. While the jury was instructed that Respondent could lawfully terminate Respondent for harassing co-workers, *id.* at E6, the jury was not provided with a definition of Respondent's defense of religious harassment.

The jury returned a verdict for Respondent. The jury found the following in response to special interrogatories:

1. Mr. Weiss was qualified for, and satisfactorily performed his job (App. to Petition No. 01-217 at F1);
2. Mr. Weiss did not harass other employees (*Id.*);
3. Religion made a difference in REN's decision to terminate Mr. Weiss (App. to Pet. No. 01-217 at F2);
4. Mr. Weiss suffered compensatory damages in the amount of $35,000 (*Id.*); and
5. REN acted willfully, intentionally or with reckless indifference to Plaintiff's rights in terminating Mr. Weiss, awarding him $125,000 in punitive damages. (App. to Pet. No. 01-217 at F3)

On Respondent's post-trial motions, the court entered judgment as a matter of law and alternatively granted a new trial. App. C to Pet. No. 01-217. Respondent appealed to the Eleventh Circuit.

On review of the FED. R. CIV. PROC. 50 judgment as a matter of law, without reweighing the evidence and considering the facts in a light most favorable to Respondent, the Eleventh Circuit held:

> Reasonable jurors could have found, by a preponderance of the evidence, that (1) Appellant satisfactorily performed his job, (2) he did not harass his co-workers, and (3) religion made a difference in appellee's decision to terminate Appellant.

App. at 3.

The Court of Appeals thus found, based on the testimony of the two REN supervisors, Dr. Brian Walters and Pamela McDaniel, that Respondent was a good and accurate employee. *Id.* The court "accepted" Respondent's statement that the Moslem co-worker to whom he offered the Bible simply rejected the offer, saying "No thank you" and that Respondent did not try to push the Bible on him. App. at 3-4. The court accepted Respondent's testimony that he never told a lesbian co-worker that she would "burn in hell." App. at 4. The court accepted Respondent's testimony that the coworkers with whom he prayed did so by consent and were not offended, and that Respondent's only involvement with Claudette Canatella at the farewell party was to agree with Savino's remark that "It's good to attend church." *Id.*

REASONS A WRIT SHOULD NOT ISSUE

I. CERTIORARI IS NOT WARRANTED BECAUSE THE ELEVENTH CIRCUIT PROPERLY REVIEWED ALL EVIDENCE IN THE CASE IN THE LIGHT MOST FAVORABLE TO THE RESPONDENT, AND PETITIONER'S EVIDENCE WAS NOT UNDISPUTED

Petitioner's appeal stands almost entirely on its assertion that the Eleventh Circuit "reviewed only the self-serving testimony favoring [Respondent]" in reversing the District Court's grant of judgment as a matter of law. Pet. at 6. *See also* Pet. at 7 ("the Eleventh Circuit has taken the position that a plaintiff's self-serving testimony alone... is enough evidence of pretext to withstand a motion for judgment as a matter of law"); Pet. at 13 ("If Mr. Weiss can get to a jury based only on the self-serving evidence cited by the Eleventh Circuit, there is no real case-by-case analysis espoused... in *Reeves*"). Petitioner complains that

> the Eleventh Circuit only considered the self-serving testimony of Mr. Weiss that he did not harass or offend his subordinates or co-workers and that he only discussed religion with those subordinates and co-workers who consented to it or requested he pray with them.

Pet. at 6-7. Petitioner is incorrect in this assertion for at least two reasons: first, the Eleventh Circuit according to its own statements did in fact did consider the entirety of the evidence in the record in reviewing the judgment; and second, the Petitioner's evidence was not in fact "undisputed" as it alleges (Pet. at 6, 7), but highly disputed, both through Respondents' own statements and those of others, as well as through direct documentary evidence of religious discrimination.

The Eleventh Circuit clearly stated that it was applying the correct test, that of a "de novo" review under the same legal standard as the trial court. Pet. App. at 2. Rather than considering *only* the Respondent's "self-serving testimony," as Petitioner contends it did, the Court of Appeals made its decision "based upon the evidence presented," App. at 3, citing *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). The court appropriately "consider[ed] the evidence in the light most favorable to the non-moving party [Respondent]," but refrained from "weighing the evidence or assessing the credibility of witnesses." *Id.* Applying this standard, the Court of Appeals stated:

> We conclude reasonable jurors could have found, by a preponderance of the evidence, that (1) Appellant satisfactorily performed his job, (2) he did not harass his co-workers, and (3) religion made a difference in [REN's] decision to terminate [Weiss].

App. at 3. The court noted that it was bound to "consider the facts in the light most favorable to [Weiss]," and that it was "bound to accept [Weiss'] version of the disputed facts...." *Id.* The court did not, however, state that it *only* relied upon Respondent's testimony; it simply set out portions of Respondent's testimony that reflected his version of the disputed facts, which it was required to accept. This was in complete accord with the Court's direction in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). "[I]n entertaining a motion for judgment as a matter of law, the court should review all the evidence in the record." 530 U.S. at 150. "In doing so... the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* The instant case is a classic example of what the Court in *Reeves* characterized as a "semantic" distinction between articulations of the Rule 50 standard. 530 U.S. at 150. Like the lower courts that had misstated the Court's articulation of the standard in *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), Petitioners have confused the Eleventh Circuit's statement of "the evidence to which the trial court should *give credence*" with that which "the court should *review*." *Reeves*, 530 U.S. at 150 (emphasis in original). The Eleventh Circuit engaged in an appropriate *Reeves* analysis, and review of its decision is thus not called for.

Further, contrary to Petitioner's assertion, REN did not offer "undisputed contradictory evidence." Pet. at 7. As the foregoing statement of facts demonstrates, the evidence was highly disputed on nearly every issue, ranging from Respondent's satisfactory performance of his job (a matter that the District Court found amply demonstrated based in part on admissions by REN's employees, and did not in fact rely upon in granting judgment to REN) to the pretextual nature of his termination. On this latter point, testimony

was adduced regarding the event that allegedly directly led to his termination, the Claudette Cannatella "crucifix conversation" (cited in the terminationnotice) not just from Respondent, but from his ex-wife, Virginia Savino, who reported a completely benign, inoffensive and polite conversation that could not have been construed as harassing. *See* Statement of Facts, *supra*, at 7. Petitioner's evidence was thus far from "uncontradicted," or "unimpeached," as *Reeves* requires. Pet. at 8, citing *Reeves*, 530 U.S. at 150-51. *See also Reeves*, 530 U.S. at 151 ("unimpeached"). Nor could it be regarded as coming from "disinterested witnesses," as Petitioner claims, *id.*, citing *Reeves*, *ibid.* All of REN's witnesses were REN employees, and many of them held supervisory or management positions. A lay witness who is still employed by the defendant employer cannot be considered "disinterested," at least to the extent their testimony must be given particular credence.

For these reasons, the cases cited by Petitioner in support ot its contention that a conflict exists among the Circuits are inapposite. Each of the cases addresses the quantum of evidence proferred by the plaintiff to meet the burden shifting standard of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In each of the cases, the plaintiff established or was assumed to have established a prima facie case, but in order to establish pretext, offered only the bare, uncorroborated testimony of the plaintiff. As discussed above, that is not the case here, as Respondent has offered the testimony of other witnesses in addition to his own, and the testimony of Petitioner's witnesses is hardly uncontroverted.[3]

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[3] In *Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 281 (4th Cir. 2000), a racial discrimination wrongful discharge case, Hawkins alleged that her negative reviews were wrong, and that she actually did her job well. 203 F.3d at 279. The court invoked the well-recognized rule that the correctness of the reason offered for discharge is irrelevant. *Id. Jackson v. E.J. Brach Corp.*, 176 F.3d 971 (7th Cir. 1999), *Stevens v. St. Louis University Medical Center*, 97 F.3d 268 (8th

II. CERTIORARI IS NOT WARRANTED BECAUSE NO REAL CONFLICT EXISTS BETWEEN THE CIRCUITS WITH RESPECT TO A PLAINTIFF'S BURDEN IN AN INDIRECT PROOF CASE, AND RESPONDENT'S CASE IS ONE OF DIRECT PROOF

Because this is not a case in which there was "abundant and uncontroverted evidence that no discrimination had occurred," *see* Pet. at 11, quoting *Reeves*, 530 U.S. at 148, for the reasons discussed above, this is not the "appropriate case" to define the circumstances in which a plaintiff is required to submit evidence in

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Cir. 1996), and *Perfetti v. First Nat'l Bank of Chicago*, 950 F.2d 449 (7th Cir. 1991), also relied on this precept. Petitioner cannot rely on this rule, however, since if REN was wrong in its assessment that Respondent could be terminated for his discussions of religion, its actions were construable by the trier of fact as discriminatory. *See* 42 U.S.C. § 2000e(j): "The term "religion" includes all aspects of religious observance and practice..." Petitioner is then in the same position as an employer who asserts a "good faith" belief that Hispanic employees are poorly motivated, or that female employees will inevitably resign to have children. This kind of incorrect "reason" cannot stand muster as a matter of law.

Nichols v. Lewis Grocer, 138 F.3d 563 (1998), involved a sex discrimination non-promotion case in which "the only evidence linking [plaintiff's pass-over] to gender-based bias was [plaintiff's] self-serving testimony," and abundant objective evidence existed of the other candidate's superior qualifications. 138 F.3d at 570. *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556 (5th Cir. 1983), is to the same effect insofar as the court had only "generalized testimony by an employee regarding his subjective belief that his discharge was the result of age discrimination...." *Id.* at 564. Also to the same effect is *Babbar v. Ebadi*, 216 F.3d 1086 (10th Cir. 2000), in which the plaintiff sought to establish anti-Hindu animus in his pass-over for tenure by his bare allegations of discrimination alone.

addition to a prima facie case and proof of pretext. Pet. at 13, quoting *Reeves,* 530 U.S. at 154-55 (Ginsburg, J., concurring).

Further, the cases cited by Petitioner do not reveal any conflict among the Circuits with respect to the application of the *Reeves* standard for judgment as a matter of law. None of the three cases cited by Petitioner for the "conflict" actually reviewed a grant of judgment as a matter of law after trial. While the standard under Rule 50 is the same as that under Rule 56, *see Reeves*, 530 U.S. at 150, a trial affords the parties and the court a much fuller opportunity to develop the evidence for review. Accordingly, it would not be appropriate to grant certiorari to resolve any apparent differences of opinion ("semantic" or otherwise) on the *Reeves* standard for Rule 50 motions in the context of Circuit cases reviewing summary judgment before trial.

Perhaps more importantly, Respondent's case was not merely a case of indirect or circumstantial evidence. Respondent relied upon the Petitioner's direct evidence of the termination notice, which stated that the reason for his termination was "RELIGION." *See* Appellant's Initial Brief in Appeal No. 99-14355 (U.S.C.A. 11), at 30, 32-34. It is hard to conceive of more direct evidence than this, an affirmative admission by the employer in the termination notice itself. The *McDonnell Douglas/Burdine* test applies where the plaintiff seeks to prove his case through circumstantial, not direct evidence. Arguably, then, the Eleventh Circuit was not even required to apply that standard in reviewing the District Court's grant of judgment as a matter of law; Respondent was entitled to have a jury determine if he would have been fired "but for" the discriminatory reason.

CONCLUSION

The issues for the jury were simple: did Respondent harass his co-workers, and if not, was Respondent terminated as a result of the practice of his religion? The facts were highly disputed on almost every point at issue. "[T]he more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury." Wright & Miller, FEDERAL

PRACTICE & PROCEDURE, § 2806, at p. 67.

The facts were undisputed that Respondent was not fired because of job performance, and that was expressly *not* one of the grounds upon which the District Court set aside the jury's verdict. The termination notice clearly indicated that the sole basis for his termination was the Claudette Cannatella conversation. Respondent presented evidence from which the jury could conclude that REN manufactured the offending Claudette Canatella conversation, turning it falsely into the "one last straw" of religious harassment, and that the jury could conclude that the real reason Respondent was fired was not because he was harassing co-workers but because of the practice of his religion. "If the only reason an employer offers for [its challenged action] is a lie, the inference that the real reason was a forbidden one may rationally be drawn and there must be a trial." *Helland v. South Bend Community School Corp.*, 93 F.3d 327, 330 (7th Cir. 1996). Accordingly, the Eleventh Circuit properly reversed the District Court's order granting Petitioner judgment as a matter of law, and certiorari is not warranted in this case.

For the reasons set forth above, Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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